TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

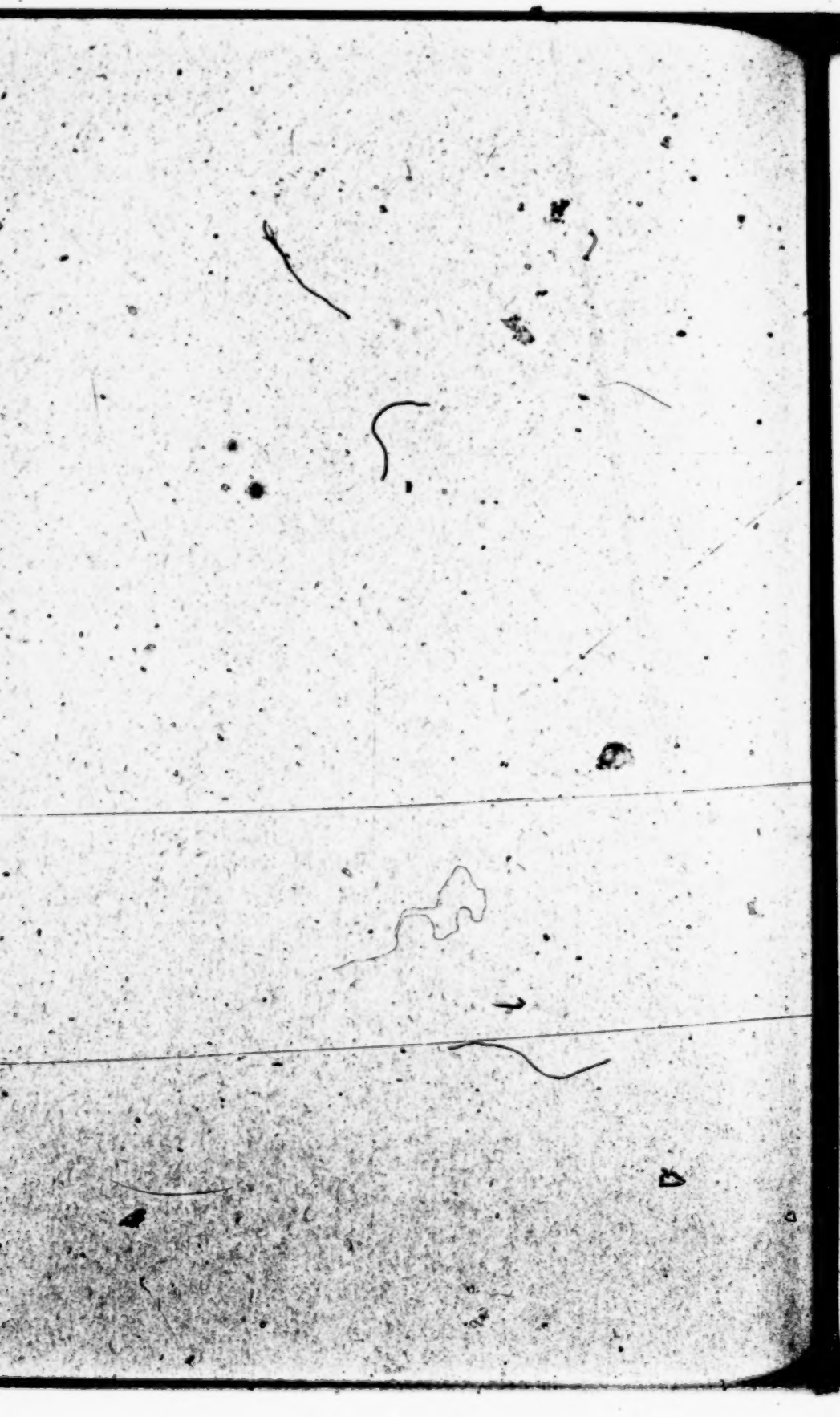
vs.

WILLIAM W. SCARLETT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1936.

CERTIORARI GRANTED DECEMBER 7, 1936.



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IN SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

No. 18553

WILLIAM W. SCARLETT, Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY, a Corporation, Defendant

COMPLAINT FOR DAMAGES—Filed February 10, 1933

Plaintiff complains of defendant, and for cause of action alleges:

I

That at all times herein mentioned the defendant was and is a corporation organized and existing under and by virtue of the laws of the state of Kansas, doing business in the state of California and in the county of Contra Costa, and the owner and operator of the railroad tracks, works and equipment hereinafter referred to; that at all of said times said railroad track of defendant extended without interruption through the states of California, Arizona and other states, and together with said works and [fol. 6] equipment were used indiscriminately by defendant for interstate and intrastate commerce.

II

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce between the states of California, Arizona and other states, and plaintiff was employed by defendant, in such commerce; and that the injury to plaintiff, herein complained of, arose in the course of and while defendant and plaintiff were engaged in the conduct of such interstate commerce and as a proximate result of the negligence of the defendant.

III

That on or about the 27th day of August, 1931, the defendant was running and operating over said track a cer-

tain train, carrying merchandise and freight in transit from and between Oakland, California, and points west thereof; and plaintiff was employed by defendant as a brakeman upon said train; that at Mormon, California, defendant temporarily halted said train for the purpose of setting out certain cars therefrom and picking up other cars to be assembled in said train.

IV

That at said time and place, and while defendant and plaintiff were so engaged in said re-assembly of said train, plaintiff, descending a car thereof by way of a ladder or [fol. 7] handholds therefor provided, encountered an obstruction to his footing and an impairment of the footing customarily provided for trainmen ascending and descending cars on the lines of defendant and other lines throughout the United States, and as a direct and proximate result of said obstruction and impairment plaintiff was caused to and did lose his footing and fall from said car of said train to the ground, injuring and damaging him in the following particulars, to-wit: The bones of plaintiff's left wrist were broken and fractured, entailing a removal of certain of said bones and a consequent permanent disability of plaintiff's left wrist, hand and arm.

V

That said obstruction or impairment consisted of a novel type of brace rod running diagonally on the side of said car beneath the ladder and was negligently introduced into and maintained in use and service upon said train of said carrier without notice or warning thereof to plaintiff.

VI

That at the time of the accident referred to, plaintiff was earning from his occupation stated the average sum of two hundred ten dollars ($210) per month; that since said accident and account of the injury therein sustained, plaintiff has been and is totally and permanently disabled and incapacitated.

[fol. 8] VII

That by reason of the premises plaintiff has been damaged in the sum of fifty thousand dollars ($50,000), no part of which has been paid.

Wherefore, plaintiff prays judgment against defendant in the sum of fifty thousand dollars ($50,000) and costs of suit incurred herein.

M. Mitchell Bourquin, Attorney for Plaintiff.

Duly sworn to by Wm. W. Scarlett. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 9] In Superior Court of Contra Costa County

Answer—Filed March 17, 1933

Comes now The Atchison, Topeka and Santa Fe Railway Company, a corporation, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I

Denies that at the time or place alleged in plaintiff's complaint, or at any time or place, or at all, this defendant was guilty of any negligence causing or contributing to any injuries or damages that the plaintiff is alleged to have suffered or sustained on account of any of the matters and things alleged and set forth in plaintiff's complaint, either in the amount claimed therein or in any other amount, or at all.

II

Answering paragraph II of plaintiff's complaint this defendant denies that it was guilty of any negligence that proximately resulted in any injury to the plaintiff.

III

Denies each and every, all and singular, the allegations contained in paragraph IV of plaintiff's complaint.

IV

Denies each and every, all and singular, the allegations contained in paragraph V of plaintiff's complaint.

[fol. 10]

V

Denies each and every, all and singular, the allegations contained in paragraph VI of plaintiff's complaint.

VI

Denies each and every, all and singular, the allegations contained in paragraph VII of plaintiff's complaint.

VII

For a further answer to plaintiff's complaint and for a further and separate defense herein, defendant alleges that plaintiff was a man of long experience in railroading and knew and appreciated the ordinary duties and risks of brakemen and that at said time and place the plaintiff was thoroughly familiar with all the facilities then in use on defendant's freight cars and particularly the ladders and anchor rods thereon, and defendant alleges that if plaintiff sustained any injuries and/or damages at the time and place alleged in his complaint, or otherwise, said injuries and/or damages were each and all received and sustained by him in consequence of risks incident to his employment and also as were obvious and patent to a person of ordinary observation, all of which risks plaintiff recognized, appreciated and assumed, and that plaintiff in attempting to descend to the ground by the use of such side-ladder on said [fol. 11] freight car at the time and in the manner there attempted assumed all the risks of accident and/or injury while so doing.

VIII

For a further answer to plaintiff's complaint and for a further and separate defense thereto defendant alleges that if plaintiff suffered any injuries and/or damages at the time and place alleged in his complaint, or otherwise, said injuries and/or damages were solely and proximately caused by his own negligence and carelessness in failing to use or exercise reasonable care or any care in climbing down the side-ladder of said freight car.

IX

For a further answer to plaintiff's complaint and for a further and separate defense thereto defendant alleges that if plaintiff suffered any injuries and/or damages at the time and place alleged in his complaint, or otherwise, said injuries and/or damages were proximately caused or con-

tributed to by his own negligence and carelessness in failing to use or exercise reasonable care or any care in climbing down the side-ladder of said freight car.

[fol. 12] Wherefore, this answering defendant prays that plaintiff take nothing by his complaint and that defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, be hence dismissed and have judgment for its costs herein.

Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company.

Verified.

[File endorsement omitted.]

In Superior Court of Contra Costa County

Verdict of the Jury—Filed September 26, 1933

We, the jury in this case, find for the plaintiff and assess his damages against the defendant in the sum of $18,000.00 dollars.

Wm. M. Luiz, Foreman.

[File endorsement omitted.]

[fol. 13] In Superior Court of Contra Costa County

Judgment on Verdict—Filed September 27, 1933

This action came on regularly for trial. The parties appeared by their respective attorneys, Clifton Hildebrand, Jas. F. Hoey, Werner, Martin and Hildebrand, Esq., for plaintiff, and Robert Brennan, Leo E. Sievert, H. K. Lockwood and T. M. Carlson, Esq., for defendant. A jury of twelve persons was regularly empaneled and sworn to try the cause. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider of their verdict, and subsequently

returned into court, were called, and all answered to their names, and presented the following verdict, to-wit:

We, the jury in this case, find for the plaintiff and assess his damages against the defendant in the sum of $18,000.00.

Wm. M. Luiz, Foreman.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is

[fol. 14] Ordered, adjudged and decreed that said plaintiff William Scarlett do have and recover of and from said defendant The Atchison, Topeka & Santa Fe Railway Company, a corporation, the sum of $18,000.00, together with all his said plaintiff's costs and disbursements incurred in this action, amounting to the sum of —— dollars.

Judgment entered this 27th day of September, A. D. 1933.

S. C. Wells, Clerk, by W. T. Paasch, Deputy Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 15] Clerk's certificate to Judgment Roll omitted in printing.

[fol. 16] In Superior Court of Contra Costa County

Notice of Appeal—Filed November 1, 1933

To the Clerk of the Above Entitled Court and to William W. Scarlett, Plaintiff in the Above Entitled Action, and to Werner, Martin & Hildebrand, Attorneys for Plaintiff:

You and each of you will please take notice that The Atchison, Topeka and Santa Fe Railway Company, a corporation, the defendant in the above entitled action, hereby appeals to the District Court of Appeal for the First Appellate District of the state of California from the judgment given and rendered on the 26th day of September, 1933, and entered on the 27th day of September, 1933, in the above entitled cause, in favor of the plaintiff and against

the defendant, recorded in volume 41, page 92 of judgments, and from the whole thereof.

Dated at Los Angeles, California, this 24th day of October, 1933.

Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for the Defendant, The Atchison, Topeka and Santa Fe Railway Company.

[File endorsement omitted.]

[fol. 17] In Superior Court of Contra Costa County

Defendant's Engrossed Bill of Exceptions—Filed April 16, 1934

Be it remembered that the above entitled cause came on regularly for trial before the Superior Court of Contra Costa county, Honorable A. B. McKenzie presiding, sitting with a jury; Clifton Hildebrand, Esq., and James F. Hoey, Esq., appearing as attorneys for plaintiff, and Robert Brennan, Esq., Leo E. Sievert, Esq., H. K. Lockwood, Esq., and Thomas M. Carlson, Esq., appearing as attorneys for defendant, and the said cause was tried on September 20th, 21st, 22nd, 25th and 26th, 1933, and thereupon the following proceedings and no other were had:

Mr. Hildebrand, counsel for plaintiff, in his opening statement to the jury, said:

Opening Statement for Plaintiff

This is a case, and I might say, for the benefit of Your Honor, at the outset, that is brought under two separate federal statutes. It is brought first under the Federal Employers' Liability Act, with which I know Your Honor is well familiar, section 51, and it is also brought under the Federal Safety Appliance Act, section 11 of that act, which has a somewhat different significance from section 51, the general act, which is part of the Federal Employers' Liability Act. The two acts, however, Your Honor, I will go into later, are construed together and I will discuss them together in that connection later on but His Honor will [fol. 18] instruct you as to the law. I am merely taking that opening statement to indicate that the case is brought under these two federal statutes and it is brought under

these two statutes by reason of the fact that it is alleged that the employee, in this case, Mr. Scarlett, who had been a brakeman with the Santa Fe for, well thirty years, was engaged in interstate commerce at the time when he was hurt, so that these special federal statutes became applicable to his case.

At the close of the opening statement of plaintiff's counsel, Mr. Lockwood, defendant's counsel, in the presence of the court and jury, stated:

STATEMENT FOR DEFENDANT

The defendant excepts to and objects to that part of the opening statement of counsel for the plaintiff which in effect that the plaintiff was claiming in this case a safety appliance defect, for the reason that no safety appliance defect has been pleaded in the complaint and the defendant at this time objects to the introduction of any evidence in this case tending to show any safety appliance defect, for the reason that there is no issue as to any safety appliance defect, nothing in the pleadings about any safety appliance defect. The plaintiff has pleaded a case predicated entirely [fol. 19] upon the Federal Employers' Liability Act, and the only act of negligence complained of is, that the defendant negligently introduced and maintained and used in service on the train a so-called obstruction or impairment alleged to consist of a novel type of brace-rod running diagonally on the side of said car beneath the ladder and the further allegation that this was introduced without notice or warning to the plaintiff, and nowhere in the complaint has there been any allegation as to any safety appliance defect; therefore, we object to the introduction of any evidence tending to show any safety appliance defect.

To which Mr. Hildebrand, plaintiff's counsel, said:

Does Your Honor want any argument on that matter?

And the following statement was made by the court:

Oh, I think not at this time. When we get to that part of the case then we will thrash that out, whether or not that is an issue within the pleadings or not. I am saying this to the jury, that irrespective of what counsel has said in his opening statement, the law involved in this case will be given to you later by the court. Now proceed, gentlemen.

[fol. 20] DR. ALFRED H. REUDY, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hoey:

I am a physician and surgeon, duly licensed and practicing under the laws of California. I am a graduate of the medical department of the University of Oregon, of the Chicago Post Graduate, New York Post Graduate, medical department of the University of Vienna, Austria, medical department of the University of Berne, Switzerland. I have been a duly licensed and practicing physician in California since August 5, 1898. I have had experience as a railroad doctor. I was surgeon for several years on the surgical staff of the Oregon Railroad Company, and the Spokane, Portland and Seattle Railroad. I examined plaintiff five times from August 30th to September 16, 1933. I inquired into his history. He has always been in good health and has never had any chronic diseases before August 27, 1931, when he fell, injuring his left wrist, breaking and crushing his left wrist joint—in the joint in the carpal bone mostly. I examined the left wrist and found it to be very painful, tender and sensitive, and loss of motion upward and downward and sideways, at least fifty per cent. And [fol. 21] then I had some X-rays made on September 16th which show that two main supporting bones of the wrist-joint, his scaphoid bone and the semilunar bone, which support his joints, were removed by operation on December 4th and December 22, 1931. I had X-rays of the left wrist and hand of Mr. Scarlett taken in my presence. They show two deep cavities below the wrist joint. I discovered at least a fifty per cent disability of a permanent nature in movement and in loss of function, useful function. His disability was a result of the injury from August 27th, 1931, and the two operations in December, 1931, removal of the two bones, main bones supporting the wrist joints below the radius, the distal end of the radius; which is the scaphoid, and the semilunar bones in the joint.

Q. Doctor, when you examined this plaintiff's hand, would you say that at that time you observed that the bones had been removed?

A. By examination, yes, by physical examination, also by X-ray.

Q. And how many bones were missing from his hand?

A. Two bones, two carpal bones.

Q. And can you show that on the X-ray?

A. Yes, sir.

Q. Illustrate, if you will, doctor.

A. Well—(Counsel holds X-ray up against window.) This is the thumb and here are the four fingers. This is the wrist joint, here is the radius and here is the ulna. The [fol. 22] two bones taken out are the scaphoid bone, immediately supporting the radius, and also the semilunar bone on this side, showing two deep cavities in the wrist joint and these bones that—go right on to join this carpal bone, called the pisiform, is pushed into the trapezoid bone, forming a union with it. The os magnus is pushed up into the joint supporting the lower end of the radius and forms an incomplete surface, movable surface. These bones are the same as they were before. Then the articular surface here is rough and unnatural on account of inflammation in the joint and the ball-bearing surface of the radial bones, these carpal bones. Then, of course, the ligaments and tendons running over this injured surface has been tied down by inflammation and adhesions, front and back, making the bones stiff and movable—movable only fifty per cent up and down and sideways.

Q. Doctor, would you say that that is a—is or is not a permanent disability?

A. It is a fifty per cent permanent disability of the left hand. Mr. Scarlett is not able to carry on his duties as a brakeman with the condition of his hand.

Q. Would you say that there is any operative assistance that you could—that this plaintiff could receive to remedy that condition?

[fol. 23] A. No, it could not be remedied because two bones have already been taken out.

Q. Now, doctor, what would you say was the reason for the removal of those bones?

A. Death of these bones from lack of supply of nourishment from the surrounding skin, the periosteum; they must have been crushed badly. They must have been crushed badly to tear the periosteum surrounding it which supplies

the bone with nourishment; then, of course, death of those bones or anything that makes them decay, they have to be taken out.

Q. And doctor, would you say that this plaintiff is suffering with any pain now?

A. Yes, he has very much pain and stiffness at all times, especially upon slight movement of the wrist joint.

Q. What other effect, if any, has this injury had on this plaintiff?

A. It has had an effect of reducing, shrinking the whole left arm, making it smaller than the right arm and also the irritation of the nerves traveling over this injured surface has affected the whole nervous system. It makes him very nervous in every way from the constant irritation of these nerves.

Q. Are there any visible symptoms which cause you to conclude that nervousness has resulted from this injury?

A. His general neurotic condition, the way he acts and the loss of sleep, headache and dizziness and so on.

[fol. 24] Q. Did you observe any unusual condition with his eyes?

A. I simply observed the twitching of the eyes but I didn't make any ocular examination.

Q. Doctor, I understood you to say that for some years you had been a railroad doctor.

A. Yes, sir.

Q. And you are familiar somewhat with the duties of a railroad man, brakeman, etc.?

A. Yes, sir.

Q. Would you say that this man is able to carry on his duties as a brakeman with the condition of his hand at the present time?

A. No.

Q. And will you say that he, at no time, will be able to carry on those duties?

A. At no time will he be able to carry on those duties.

Q. That is all; just a second. Is it your opinion, doctor, that this disability, which you have just testified to, was the result—is the result of the accident which occurred on August 27th, 1931?

A. Yes.

Cross-examination.

By Mr. Lockwood:

Q. Now, Dr. Reudy, did you make a test of his—of the range of the wrist and finger motions?

A. Yes, sir.

Q. Did he have any limitation of finger motion?

A. Yes, sir.

Q. To what extent?

A. I compared them with the well arm, the well wrist and [fol. 25] up and down movement is 30 degrees for the well one and 15 for the injured one. The lateral movement is ten degrees for the well arm and five degrees for the injured arm.

Q. I am speaking of the finger movements and not the wrist movement?

A. I tested the finger movements or the grasps with my hand. It is practically ten per cent of movement.

Q. Yes.

A. Of the normal.

Q. Well, isn't it a fact that his principal handicap is of the pain with the side motion of the wrist joint?

A. Both up and down and sideways.

Q. Didn't you find that he had a good range of wrist and finger motions?

A. No, sir, only fifty per cent.

Q. Now, Doctor, wouldn't you expect there would be some improvement in his case? Should not that wrist and hand progressively improve during the coming months?

A. No. It will be a permanent disability because it has been a long time since the operation and it hasn't improved.

The Court: But that is not exactly in answer to the question, doctor. I think Mr. Lockwood asked you whether or not you might not expect some improvement in the condition.

A. No, I do not.

Q. Over the situation as it is now?

A. No, sir.

[fol. 26] Q. Now, so far as him using his head and using his feet and his body in any kind of work that don't necessitate him gripping something with the left hand you found nothing, no permanent disability about him in that way, did you?

A. No.

Q. In other words, any kind of work that he could do that would not make it necessary to depend upon holding the weight of his body with his left hand he could do, could he not?

A. Yes.

Q. Then you admit, doctor, do you, that there is some hope of some improvement of the movement as far as the tendons are concerned?

A. Yes.

Q. Well, now doctor, if you see no improvement for this left wrist of Mr. Scarlett's, I suppose that it would be ideal for you to suggest any way that he could improve himself by means of therapeutics or exercises of any sort.

A. No.

Q. In other words, according to your view of the case, Mr. Scarlett won't get any relief, nor will he get any improvement by proper exercises of this wrist in the future?

A. No, because the supporting bones are gone in the wrist.

Q. Well, aren't—isn't there anything to compensate for that?

A. If it were the ligaments alone, massage and the movement would help but the main supporting bones of the wrist joint are gone and no amount of massage will remedy that.

[fol. 27] Q. How about baths, application, what effect would that have?

A. They would not replace the bones which support the wrist joint.

Q. And would prolonged heliotherapy offer any help or comfort to Mr. Scarlett?

A. No, it would not replace the taken out bones.

Q. But would not prolonged heliotherapy give him considerable comfort and would it not increase the movement somewhat?

A. It might to some extent, as far as the tendons are concerned, but not as far as the bones.

Q. Yes. Just how much improvement you are unable to say.

A. Yes.

Q. Would you say, doctor, that Mr. Scarlett would get some improvement in the movements of his left wrist by contrast baths?

A. No. Because the bones, the ball bearing bones, are gone. They are not there.

Q. I know, but what about the tendons?

A. The tendons have that much harder time to slide over the broken surface.

Q. I know, but wouldn't the contrast baths assist the tendons and help the tendons?

A. It would not help much.

Q. Do you give it, as your opinion, that it would not?

A. Yes, sir.

Q. Would you see any aid that Mr. Scarlett could get from active and passive exercise?

A. No, because the main bones are gone in the wrist.

[fol. 28] Q. The only relief then, you can see that—for Mr. Scarlett in this particular is what you call these prolonged heliotherapy manipulations or rather that light, the action of those lights.

A. No, it wouldn't—it would be all in the same category.

Q. Well, you stated a few moments ago as your opinion that these heliotherapy lights would assist somewhat.

A. As far as the tendons are concerned but not the bones.

Q. Yes, and you are still of that opinion?

A. Yes, sir.

Redirect examination.

By Mr. Hoey:

Q. Doctor, when you examined Mr. Scarlett, you did find that he was nervous, did you not?

A. Yes.

Q. You found that he did have this accident and the injury as you have observed, would you say that in your opinion that that nervousness was the result of this injury?

A. Yes, sir.

Q. Yes, and what—did you make an examination of this patient to ascertain what his grip was?

A. Yes.

Q. And how did the grip of the left hand, if any, compare with the grip of the right hand?

A. It was only ten per cent.

Q. And then he had in the left hand, he had practically no grip at all, is that true—ten per cent?

A. About ten per cent, yes.

[fol. 29] Q. And would you say that a man with—would you say that Mr. Scarlett, under his present condition, with his left hand could throw a heavy switch as required by a brakeman to be thrown?

A. No.

Q. Would you say that Mr. Scarlett would be able to climb up and down boxcars where he must have a grip upon the rung of the ladder?

A. No.

Q. If you were examining a man for, as an applicant for a position as brakeman on a railroad company would you pass this man?

A. No.

By the Court:

Q. Now, doctor, I gather from what you have stated that Mr. Scarlett suffers from movement of his hand and also from strength, is that correct?

A. Yes, Your Honor.

The Court: From both things; well, now, eliminating for the time being the question of what a brakeman requires in the way of grip and strength in his hand, what work can Mr. Scarlett do in this condition? For instance, could he pick up that book with his left hand? I am now referring to the Code of Civil Procedure, Deering's Code. Could he pick that up?

A. He could pick it up but there is a great deal of pain and it would be heavy. It would be quite painful, Your Honor.

[fol. 30] The Court: Well, you say he would have difficulty in picking that up, would he?

A. Yes, sir.

The Court: Now that results from what—from the lack of strength on account of losing two bones or from the cramped condition of his hand? What would cause the pain?

A. From both, Your Honor, the loss of the two bones and the cramped condition of his ligaments.

The Court: Do I understand that each time that Mr. Scarlett—it is your opinion that every time that Mr. Scarlett would take hold of anything with his left hand, irrespective of its weight, that he would suffer pain?

A. Yes, sir.

FRED A. ISAACSON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

I am superintendent of car construction of the Santa Fe System. This diagram (Plaintiff's Exhibit No. 4) is a diagram we class BX-11 car. Santa Fe car ATSF 12499 is within that class. On this class of cars according to the standard specifications, the distance from the side of the boxcar to the inside of the diagonal brace rod is seven-eighths of an inch. The width of the diagonal brace rod is an inch and one-eighth. The distance from the outside of the diagonal brace rod to the inside of the rung of the ladder is two and three-quarters inches. The width of one of [fol. 31] these rungs of the ladder is thirteen-sixteenths of an inch. The length of one of these brace rods is six feet ten and one-quarter inches.

Direct examination.

By Mr. Hildebrand:

Q. Now, as I understand your testimony, then at the point where this brace rod is immediately back of the rung of the ladder the distance between the back of the rung of the ladder and the outside of the brace rod is two and three-quarters inches.

A. According to specifications, yes.

Q. And in construction will that distance vary any?

A. Slightly.

Q. What is the maximum amount of variation?

A. Probably an eighth of an inch either way, slightly more in some cases, but not very much.

Cross-examination.

By Mr. Lockwood:

I live in Topeka, Kansas. I am engineer of car construction of the Santa Fe Railway. I have had 33 years of actual shop practice, engineering, designing and in charge of car-building. I designed this particular car (being the class and type of car involved in this accident).

[fol. 32] Further direct examination:

Exception No. 1

Thereupon the following proceedings were had:

Mr. Hildebrand:

Q. With reference to the question I have just asked you, I will ask you if this diagram, so far as the class of car and the brace rod and its location with reference to the ladder is concerned, is a fair representation of the type of car we have been speaking of?

A. It looks like it. It is not the same class of car.

Q. Not the same class of car but the dimensions we have been mentioning would be the same, would they, approximately?

A. Oh, they would be somewhere close, not exactly.

Q. They don't vary more, I think you said, than about one-eighth of an inch.

A. One-eighth of an inch or slightly more.

Q. Now, I will show you this photograph and ask you if that photograph is a fair representation of this type of car, so far as the brace rod and the distances I have asked you about, are concerned?

A. Fairly so but it isn't exactly like the diagram.

Q. What difference is there between that photograph and the diagram?

A. You have more space in here on the photograph than you do on the diagram.

[fol. 33] Q. More space in where?

A. In this distance from here to here, where a man's foot would rest going down the ladder.

Q. How much more space is there?

A. I couldn't say exactly but from the looks of it this has at least an inch and a half or two inches more space than the diagram.

Q. Aside from your belief that it has more space than the diagram, is it a fair representation otherwise of the type and character and location?

A. Yes.

Mr. Hildebrand: I would offer this in evidence, if Your Honor please.

The Court: The photograph——

Mr. Lockwood: Now, that is objected to for the reason it is incompetent, irrelevant, immaterial. It is not a representation of any car involved in this accident and it is not shown to be within the class of cars which was testified to by the witness that—in his examination.

The Court: The objection overruled, and the photograph just referred to is received in evidence and may be marked "Plaintiff's Exhibit No. 2." Well, I would say this, which is a matter, I think, of common knowledge; photographs sometimes do and sometimes do not correctly represent space and distance. For instance, how far that rod or that brace rod is from those rungs on the ladder; I would say this, it is only fair to caution you that a photograph sometimes is [fol. 34] misleading in that particular. I think there is no impropriety in my saying at the present time to look at that photograph there is no space shown on there at all.

Mr. Hildebrand: No. Your Honor, that shows right from the front.

The Court: Yes.

To which ruling of the court the defendant then and there duly excepted.

Exception No. 2

Thereupon the following proceedings were had:

Mr. Hildebrand:

Q. Now I will show you this photograph and I will ask you if that is a fair representation of the side view of the brace rod of this same type and description we have been discussing here (handing photograph to witness).

A. The rod is the same but it isn't the same type or class of car.

Q. Is it the same location and same type of rod with reference to the ladder?

A. I would say not exactly.

Q. Well how much variation would it be from this space?

Mr. Lockwood: Object to that as immaterial, because the witness by his answers has already eliminated that photograph and it will not be profitable to offer that to the jury in the light of the questions that you have been asking this witness concerning it.

[fol. 35] Mr. Hildebrand: We think it would go to the weight, Your Honor, and the qualification he has about it

would be qualification on the picture but yet the picture, I take it, would be admissible, subject to those qualifications.

The Court: Well, what do you expect to show, Mr. Hildebrand?

Mr. Hildebrand: Just a side view of this thing in the photograph.

The Court: Well, but here I take it, that your claim is that this ladder, the rungs on this ladder had something back of them there that didn't give a person using the ladder sufficient footing.

Mr. Hildebrand: That is the idea.

The Court: That is the purpose.

Mr. Hildebrand: Yes.

The Court: Well, now, if there was a rod there that one might or might not encounter in coming down that ladder and it is two and three-quarters inches from the inside of the rod and the rod was half an inch wide, that would give a certain amount of footing. Now does that require any picture?

Mr. Hildebrand: Well, I suppose not. I think the jury and the court might get a better idea of it by seeing certain photographs. It is accumulative.

The Court: The objection overruled. The photograph [fol. 36] just referred to is received in evidence and may be marked, "Plaintiff's Exhibit No. 3."

To which ruling of the court the defendant then and there duly excepted.

Emery E. Smith, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hildebrand:

I am a member of the firm of Smith, Emery & Company, engineers and chemists of about 29 years' experience. We have about fifty engineers, inspectors and chemists employed. At one time I was head of the Department of Agriculture of the Stanford University. That was with particular reference to agricultural engineering. For the last 29 years I have been engaged in this specialized engineering work. During the war I was Commissioner of the

American Iron and Steel Institute and the War Industries Board for Iron and Steel in the thirteen Pacific states. We are western inspectors for materials for the Golden Gate bridge. We also inspected the Antioch bridge; also the Alameda-Oakland tube; also the court house at Martinez. We do a good deal of hazardous work ourselves and have paid a good deal of attention to safety matters. We are also called on to investigate many cases of accidents on [fol. 37] ships and by the State Accident Commission, and various agencies, private and public. The inspection of rolling stock of railroads is part of our work. We have more or less questions arising from time to time regarding matters of inspecting the equipment of railroads, although we have not specialized in railroad equipment. Referring to Plaintiff's Exhibit No. 4 this is the same type of car that I have been examining having steel ends, single sheath end, steel outside bracings. (Plaintiff's Exhibit No. 4 identified as the blueprint and received in evidence.) Plaintiff's Exhibit No. 2 shows the same type of rod so far as the location is concerned as the diagram marked "Plaintiff's Exhibit No. 4."

WILLIAM W. SCARLETT, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hildebrand:

I am the plaintiff in this case. I reside at Richmond, California, with my wife. I started railroading in 1902 with the Santa Fe and worked up until 1931. I sustained accident on August 27, 1931. Prior to that time I had been working regularly and steadily for the Santa Fe. My health had been good. No serious ill-health prior to then, outside of a passing cold or something of that kind. Dur- [fol. 38] ing 1930 I would say I averaged about $210.00 per month in wages and it run about that amount prior to that time. I was working as a passenger brakeman during these years and up until May 1st, 1931. From that time up until the time of the accident I was freight brakeman. I was rear brakeman most of the time. My duties were to protect the railroad train and help in performing switch-

ing at certain points and inspect trains that stopped, whenever it was convenient to do so; general lookout from the rear when the train was running to observe any unusual condition that might arise in the train, such as hot journals, or any other thing that might arise. A rear brakeman was not called upon to go on top of cars only infrequently. On the day of the accident I was working as rear brakeman and we started from Richmond and were going to Calwa. The accident happened at Morman; that is right in the city limits of Stockton. The accident happened about 12:30 a. m. Just previous to the accident I was on top of the rear car of the cut of cars that we were moving back to our train, giving—transmitting signals to the engineer for this pick-up movement. That was a part of my duties. I did not know what car I was on at the time. Previous to the time of the happening of this accident I had never seen a car of the type shown in Plaintiff's Exhibit No. 2. It was customary [fol. 39] for the company to issue bulletins, notifying the men of any change in equipment that would affect their safety in any way. I never saw or had called to my attention any bulletin or notice to the effect that brace rods of this type or character would be placed behind the ladder on these cars. As I stood up on top of the box car just a few minutes before this accident occurred I did not have any knowledge that there was any brace rod behind the ladder on that back car. I had never seen any brace rod of that kind or description on any freight car in my life before, in switching cars. I had been up and down the sides of box cars quite a number of times during my thirty years of railroading, but I had never seen any rod of that type or description behind the ladder.

I went down the ladder of this car for the purpose of getting to the ground where I had other work to do. This work consisted of coupling up air hoses or assisting in making a test of the brakes and was a part of my regular duties. As I went down this ladder I stepped on a slanting rod. It was about three or four steps down. I felt the sensation of slipping down with my right foot. I felt this iron rod, this slanting rod with my right foot. The part of my foot that came in contact with this rod was the part two or three inches back of the toe of the shoe. When my foot touched [fol. 40] the iron rod I lost the hand-hold. Just previous to the time my foot touched this slanting rod I had hold of the hand-hold with my left hand. As I reached for the

next step with my right foot, I was reaching down with my right hand to the next rung and at the same time releasing my hold on the upper rung with my left hand. I had a lantern over my left arm and when my foot touched this slanting rod I fell to the ground and that is the last I knew. When my foot touched the rod it slipped down like it was on a greased rod of some kind and my body seemed to fall kind of to one side. The train was moving at that time. When I hit the ground I was unconscious. When I came to I was aching all over. My arm, back and head. I had struck my head on the ground. I was aching from my hand clean up the full length of my arm. From the scene of the accident I was taken to the caboose and then to Calwa. I received medical attention at Fresno by Dr. A. H. Sweeney, who put some sort of ointment on it and bandaged it up and put it in a sling. My hand pained me and continued to pain me. I was taken to Richmond where I received medical treatment the following morning by Dr. U. S. Abbott. He took an X-ray picture first and then put my hand in a plaster cast, keeping it there about twelve days. Then he took off the cast and put splints on it, keep-
[fol. 41] ing the splints on for about the same length of time. I was under Dr. Abbott's care for possibly six weeks and then I went to the Santa Fe Hospital at Los Angeles where they examined my hand, arm and wrist. They took a picture of the wrist and gave me physio-therapy treatments. During all this time my hand and wrist were painful. Even today there is more or less pain there but it will ease under certain conditions. It bothers me at night and interferes with my sleep. During the first six or eight weeks it ached down the side of my hand there and sometimes clean up into my knuckles, through the bones in the back of my hand. I had an operation at the hospital and was there from October 12th until December 4th, 1931. They took out one bone on December 4th; then they operated again on my wrist on December 18th, and took out another bone. I was at the Santa Fe Hospital in Los Angeles four months. During all of that time my hand and wrist were painful. After the operation I could not see any improvement so far as the pain was concerned. It still pains me most of the time. I could not go out and do the work of a brakeman with that hand. I could not use that hand in turning a handbrake or in going up and down the sides of a box car. I have never been able to use the hand for any

heavy work at all since the accident. I am fifty-four years of age.

[fol. 42] Exception No. 3

Thereupon the following proceedings were had:

Q. Now are you still employed by the Santa Fe?
A. No, sir.
Q. Did they discharge you?

Mr. Lockwood: Just a moment. That is objected to as incompetent, irrelevant and immaterial.

Mr. Hildebrand: I think it might bear on his ability to go back to work. He has been with them thirty years and whether he is discharged or not and can go back to work, I think that would be a material element.

The Court: The objection overruled. Of course, whether or not they discharged him has got nothing to do with whether or not—but whether he can go back to work is the point.

Mr. Lockwood: We object to any statement about his having been discharged as having no issue bearing upon the case.

The Court: Well, the court ruled on that.

Q. Were you discharged?
A. Yes, sir.

To which ruling of the court the defendant then and there duly excepted.

Cross-examination.

By Mr. Lockwood:

When I was climbing down this ladder my right foot came in contact with a rod. I knew that it was an iron rod of [fol. 43] some kind in a slanting position.

The Court: As I understand it, gentlemen, we all understand that when the witness or counsel speaks of a rod or use the word "rod," they mean the stay rod back of the ladder.

Mr. Hildebrand: Yes, Your Honor.

The Court: And that when we speak of the "ladder," we speak of the rungs of the ladder.

Mr. Hildebrand: Yes.

The Court: All right, proceed. By the way, what angle is this stay rod?

Mr. Hildebrand: Can we agree on that, counsel, that it is about a——

Mr. Lockwood: I would suggest that you ask Mr. Isaacson, I have no objection to your asking him now.

FRED A. ISAACSON, recalled on behalf of plaintiff and testified as follows:

Q. What angle would you say that is, Mr. Isaacson?
A. Forty-five degrees.

WILLIAM W. SCARLETT, witness for plaintiff, resumes stand on

Cross-examination.

By Mr. Lockwood:

That is my signature to the statement marked "Defend-
[fol. 44] ant's Exhibit No. 1" and my initials appear on the first two pages. This statement, as read into the record, is as follows:

My name is W. W. Scarlett, age 52 years. I reside at 766 8th St., Richmond. I am a brakeman by occupation. Am married. I have been in the service about 19 years. On August 27th, 1931, I was rear brakeman on Extra East 3146 at time I was injured at Mormon. We had hold of 15 cars and were shoving them down onto the balance of our train to make a coupling after which we were to leave town. I was riding on top of rear car of the cut. I do not remember the number of this car, all I know is that it was the rear car of the cut. I saw the conductor standing at head car of train to make the coupling, so I walked over top to east end of car and started down the side ladder, on south side of train. I do not remember whether this was the "A" end or "B" end of the car, but upon second thought, it seems to me it was the side ladder of the "A" end of the car, anyway it was the side ladder on the east end of the car. I was about a third of the way down this side

ladder, when all at once my foot seemed to slip or flew out, I was not expecting this and my foot slipping brought all my weight on my hands, causing me to lose my hold and I fell to the ground. The cut was moving about two miles an hour at time of accident, moving along smoothly without [fol. 45] any jerking or rough handling of any kind, either before or at time of accident. There were no defects—of any kind in this side ladder or any other part of equipment, so far as I know and no negligence on part of any other member of crew or anyone else. I do not have any idea as to what caused my foot to slip. My shoes were dry and the soles in first-class shape. The ladder was also dry. This was a pure accident and I do not know the cause. The doctor estimated there would be a little more than two weeks' time lost. I was holding a regular run, paying a little better than $200.00 a month. If an allowance can be made me, it will be very much appreciated. My injuries consist of a sprained back, and both wrists injured, the left being in bad shape at the present time. I was riding on top of rear car to pass signals to engineer. The engine was on a curve and signals from ground could not be seen by engineman.

Then in his own handwriting, "I have read the three sheets and find them correct. W. W. Scarlett." Witness, J. R. Anderson. The first two pages of the statement bear the initials "W. W. S." and "J. R. A." The body of the statement was written by J. R. Anderson, claim agent for the defendant. I have talked with Mr. O. F. Gray in the Santa Fe offices in Los Angeles about March 14, 1932. At the time my statement marked "Defendant's Exhibit No. 1" was taken by Mr. Anderson, I believe he asked me how [fol. 46] the accident happened and I told him what I knew about it. I did not dictate any of the statement; we just carried on an ordinary conversation. I volunteered practically all of the stuff, whatever I said. Part of the statement is true and part of it is not. Mr. Anderson misquoted me in this statement.

Q. Yes, and that statement was the truth, was it not?

A. Some of it is and some of it isn't.

Q. Well, so that we may know what you claim is the truth and what isn't the truth, I will hand your statement to you and I wish you would point out to the jury in that statement what is true and what isn't true? I am referring now

to "Defendant's Exhibit No. 1." (Counsel hands paper to witness, who examines same.)

A. Here is a part that isn't a fact, "I was about a third of the way down." That wasn't mentioned at all.

Q. All right, point out something else that is true or untrue in regard to that statement. That much is untrue?

A. Yes, it is, lots of it here, in fact, there was nothing mentioned about defects.

Q. All right, see what it says there so that we will know just what you have in mind.

A. (Reading:) "There were no defects of any kind in this side ladder or any other part of the equipment."

Q. Was that true?

A. Why, no, it is not a fact. How would I know about any defects.

Q. All right, point out something else that was either true or untrue.

[fol. 47] A. (Reading:) "The ladder was also dry." I made no such statement.

Q. That was untrue, was it?

A. Yes, sir.

Q. All right. State anything further there that you find that was either true or untrue.

A. (Reading:) "This was a pure accident." That expression wasn't used.

Q. Yes, you say that wasn't true?

A. That wasn't true?

Q. Well, those statements that you have referred to on page 2 there, were there when you made your initials, were they not?

A. I wouldn't swear it was.

Q. You wouldn't swear that it was?

A. No.

Q. Well, you read it over, didn't you?

A. No, sir.

Q. You didn't read it over?

A. No, sir.

Q. All right, let's point out anything further, Mr. Scarlett, in the statement anywhere that you claim was either true or untrue.

A. (Reading:) "And I do not know the cause," I did not say that.

Q. You didn't tell Mr. Anderson that?

A. No, sir.

Q. Well, that was on the paper that you signed, was it not?

A. I guess it was, maybe. I don't know.

Q. Didn't you see it there?

A. I didn't see it.

Q. Didn't you tell Mr. Anderson that?

A. Yes, I told him I read it.

Q. Well, what did you tell him that you read it for, if you didn't?

A. To satisfy him.

The Court: Pardon me for interrupting, Mr. Lockwood, but Mr. Scarlett, did you tell Mr. Anderson at that time, or did you state in his presence at that time what did cause the accident?

A. Yes, sir.

[fol. 48] The Court: All right. What did you tell Mr. Anderson at that time?

A. I told him that I slipped on a slanting iron rod, caused my foot to slip down and fly out from the side of the car. He has failed to notate any of that.

Q. Are there any other statements that you find in that instrument that are true or untrue?

A. (Reading:) "The doctor estimated it would be at least two—" let's get this—"there would be a little more than two weeks time lost"; that matter was not mentioned at all.

Q. Do you find any other statements in that instrument that were true or untrue?

A. (Reading:) "My injuries consist of a sprained back." I did not say that.

Q. Is there anything else in the statement, Mr. Scarlett, either true or untrue that you wish to call attention to?

A. I might go back to the first page where he was supposed to ask me if I was a brakeman and if I worked for the Santa Fe and such matters. He did not ask me those questions.

My eyesight was good the day the statement was taken and I was alright mentally and was possessed of all my senses. I stated to Mr. Anderson at the time just what did cause the accident. I told him that I slipped on a slanting rod, causing my foot to slip down and fly out from the side of the car. I told Mr. Anderson that I had read this statement after it was written out and I put my initials to the

[fol. 49] bottom of the pages besides signing my name. I wrote the words, "I have read the three sheets and find them correct," and that was dictated to me by Mr. Anderson; but these words are in my own handwriting. That is my signature attached to Defendant's Exhibit No. 2. Exhibit No. 2 is as follows, and was made to Mr. O. F. Gray at Los Angeles, California, on March 14th, 1932:

My name is W. W. Scarlett. Age 52 years. I reside at 766 8th St., Richmond. I am a brakeman by occupation. Am married. I have been in service of the Santa Fe Ry. Co., 19 years. With further reference to accident which resulted in my personal injury on August 27, 1931. Since making statement to Mr. J. R. Anderson concerning this accident, on September 2, 1931, I have learned that cause of accident was that my right foot slipped on the brace that goes diagonal over corner of car inside ladder. Mr. Fanning who was conductor of train pulling by my train told me that there was mark on this rod that had appearance of a foot having slipped, this car and rod had been recently painted and I believe was comparatively new.

Q. Now, after hearing that statement read, Mr. Scarlett, do you wish to change the answer that you made to a question a while ago as to whether or not it is a fact that the only thing you know about what caused this fall so far as [fol. 50] anything—so far as it having anything to do with that rod, is what someone else told you?

A. No, sir.

Q. You still insist that you knew right at the time that your foot came in contact with that rod and that is what caused you to fall.

A. I said my foot came in contact with a rod, a slanting rod, and that's true.

During the last four months before this accident I was working as brakeman under Conductors Parks, Fanning, Edmonds, Hubbard and Brown. As a brakeman it was my duty to cut off and set out cars at different stations, and in setting out these cars I would go up the sideladder and set the brakes usually, and when I worked as rear brakeman I would make out the switch lists at the terminals. In making out the switch lists I would look at each of the cars and get the number and put it down on a piece of pasteboard. Also, as the train stopped along the route I would inspect the cars. It was also the custom and practice for

the conductor to keep records of these things; also to keep a record of the switch lists. During all these four months of work on freight trains before this accident I never saw a car of the type involved in this accident.

[fol. 51] STIPULATION

It was stipulated by the parties that upon the following dates W. W. Scarlett, the plaintiff, under the following conductors was working either as a rear or head brakeman on the following number of cars of the same type of construction as the car he claims to have been injured on:

Date	Conductor	Number of cars of same type.
May 7, 1931	R. S. Edmonds	6
May 9, 1931	"	4
May 11, 1931	"	2
May 12, 1931	E. D. Hubbard	14
May 13, 1931	"	2
May 15, 1931	"	8
May 16, 1931	"	4
May 18, 1931	"	2
July 19, 1931	"	1
July 20, 1931	"	1
June 3, 1931	W. O. Parks	1
June 4, 1931	"	2
June 5, 1931	"	10
July 6, 1931	"	6
June 8, 1931	"	6
May 1, 1931	E. W. Brown	2
May 3, 1931	"	7
May 4, 1931	"	4
[fol. 52]		
May 6, 1931	"	2
May 19, 1931	"	8
May 21, 1931	"	8
May 25, 1931	"	5
May 27, 1931	"	5
May 28, 1931	"	5
May 30, 1931	"	10
May 31, 1931	"	2
June 20, 1931	"	18

Date	Conductor	Number of cars of same type
June 9, 1931	E. W. Brown	6
June 11, 1931	"	2
June 12, 1931	"	15
June 14, 1931	"	2
June 15, 1931	"	8
June 17, 1931	"	9
June 18, 1931	"	6
June 20, 1931	"	5
July 15, 1931	"	6
July 17, 1931	"	3
July 12, 1931	W. O. Parks	1
July 14, 1931	"	5
July 21, 1931	"	4
July 23, 1931	"	7
July 24, 1931	"	3
July 26, 1931	"	4
July 27, 1931	"	5
[fol. 53]		
July 29, 1931	W. O. Parks	2
July 30, 1931	"	7
August 1, 1931	"	4
August 2, 1931	"	1
August 4, 1931	"	8
August 7, 1931	"	3
August 5, 1931	"	7
August 11, 1931	"	4
August 13, 1931	"	1
August 14, 1931	"	3
August 16, 1931	"	4
August 17, 1931	"	10
August 19, 1931	"	11
June 23, 1931	J. C. Fanning	7
June 24, 1931	"	3
June 26, 1931	"	23
June 27, 1931	"	4
June 29, 1931	"	3
June 30, 1931	"	11
July 2, 1931	"	4
August 20, 1931	W. O. Parks	5
August 22, 1931	"	3
August 25, 1931	"	5
August 26, 1931	"	10

Mr. Lockwood: Is that so stipulated, gentlemen?
Mr. Hildebrand: Yes, surely.
[fol. 54] The Court: Now, as I understand——

Mr. Lockwood (interrupting):

Q. Now Mr.——

The Court (continuing): that it is stipulated that trains on the dates included in this stipulation on which Mr. Scarlett was working and acting as a brakeman, those trains on those dates had the number of cars included in the stipulation of the particular type involved in this action.
Mr. Hildebrand: Yes, Your Honor.
The Court: All right, so stipulated.

Witness Scarlett continuing: Now in operating under these conductors it was my duty when I was working as rear brakeman to make out the switch lists at the terminals, and also to inspect train at different points where it stopped. In making the switch lists I would look at the car and take the number from the car and write it down on these cards. Whenever this happened to be done at night I would use a lantern. At different stations we would take cars on and switch cars off, that is, we would switch out some of the cars and take on others. When I was working as head brakeman whenever we would set out cars at any intermediate points it would be my duty to climb up the sideladder and set the hand brakes on the cars to hold them there on the track. And in running from one terminal to another we [fol. 55] would start out with a certain number of cars and would drop a car here and there and pick up a car, or a number of cars, here and there. It was my duty, whenever there was an opportunity, to inspect the train. As a rule, when we went west on the run it was in the daylight, and when we went east on the run it would be dark.

It is necessary to go up on top of cars to set hand brakes and at other times to transmit signals, and it is quite a usual thing for a brakeman to have to set hand brakes. When we set out cars it is necessary to set the brake on at least one car; and in doing so it is necessary to climb up the side-ladder and down it, and when cars are coupled together it is necessary for the brakeman to be right at the ends of the car to manipulate the cut-lever, and when you are there by the cut-lever you are standing right by the

side of the side-ladder. Every freight car has the side-ladder right there near the cut-lever, and these angle bars that we are talking about in this case are right there where you can touch them and put your hand on them from the position where you stand when you operate the cut-lever in coupling or uncoupling cars. In going down the side-ladder on the car the brakeman uses two hands and two feet; he alternately reaches with one hand, lets go with the other and vice-versa, and the same with the feet. In other words, you keep one foot and one hand on the ladder all the [fol. 56] time. There is never a time when you are climbing up or down a ladder that you do not have one foot and one hand on the rungs of the ladder. At the time of the accident when my right foot came in contact with that rod I started to release my foot from the upper rung and my right foot slipped down the rod. I did not have a solid footing.

Q. So you took your left foot off before you had solid footing with your right, is that right?

A. Well, that's approximately right.

Redirect examination.

By Mr. Hildebrand:

When I felt my right foot was touching something, I believed it was touching the rung of the ladder.

Q. And when you thought you were touching the rung of the ladder, then did you let go with your left foot?

A. Yes, I was prepared to follow the movement. During those four months that I was in freight service I never saw this rod. When you are coming down from the top of the ladder you couldn't see one of these rods. Referring to the statement marked "Defendant's Exhibit No. 1" I did not dictate this statement to Mr. Anderson. I don't know just what he wrote; I just talked along in ordinary conversation. I did not say to Mr. Anderson that there were no defects of any kind in the side-ladder or any other part [fol. 57] of the equipment. Neither did I use the word "negligence" or that it was a "pure accident." I told Mr. Anderson that I was descending from the top of this car and when I got down three or four steps my foot suddenly struck a slanting rod that caused me to slip down and my foot flew out from the side of the car causing me to lose my

hold to the car and fall to the ground. I did not read the statement marked "Defendant's Exhibit No. 1" before I signed it. Mr. Anderson did not read this statement over to me before I signed it.

This statement, Defendant's Exhibit No. 2, I gave to Mr. Gray, in Los Angeles. I did not dictate it. The words "I have read the above statement of three sheets and it is true and correct" Mr. Gray dictated to me and I wrote that in, but I had not read those three sheets before I wrote it in.

Exception No. 4

Thereupon the following proceedings were had:

Q. By the way, what is the age limit on the Santa Fe for employing men?

Mr. Lockwood: Just a moment. Object to it as incompetent, irrelevant and immaterial, has no bearing upon the issues of the case.

Mr. Hildebrand: I think it is material about whether or not he could go back to work for some other railroad or [fol. 58] on the Santa Fe, and his age limit, he has been thirty years with the Santa Fe, and I think it would be material to show his age limit.

The Court: Well, why confine it to the Santa Fe Railroad?

Mr. Hildebrand: Well, I would follow it up with other railroads too, whether there is similar age limits for employment.

The Court: Well, I think the general rule would prevail, that is, whether or not railroads employ men after a certain age is material.

Q. Do you know whether or not railroads in general employ men after a certain age?

A. I think they all have an age limit.

Q. And what is the age limit?

Mr. Lockwood: That is objected to as incompetent, irrelevant and immaterial, no issues in the case of that.

The Court: The objection overruled. It is only for the purpose of enabling the jury to determine the amount of damages, if they should conclude to award damages—about which matter the court don't indicate any opinion in regard

to that—that that is the purpose of or the reason for which that testimony is admissible.

A. Thirty-five years of age, I believe, is the limit.

Q. You say you are fifty-three now?

A. Fifty-four.

[fol. 59] To which ruling of the court the defendant then and there duly excepted.

The Court: Mr. Scarlett, my recollection is, you said that this stay rod that we have been talking about, whether or not you could see it when you went up and down, do you mean by that that on a dark night you can't see it, but what about going up and down it in the daytime?

A. Well it is—it would be possible to see it in the daytime.

The Court: Well, what do you mean by "possible"? Could you miss seeing it?

A. Well, I mean by that it is really so obscure, it is so insignificant that the average trainman, in going up and down the ladder wouldn't be looking for a thing of that kind. It don't mean anything to him.

The Court: Well, now that it don't mean anything, there would be no difficulty in seeing it, would there?

A. No, if you——

The Court: If you were climbing up and down the ladder there wouldn't be any difficulty about seeing it?

A. You could see it.

The Court: What?

A. You could see it, yes.

The Court: Well, you mean you couldn't see it on this night on account of the darkness?

A. Well, it was below me, I would have to look down below me to have seen that rod on this occasion.

[fol. 60] The Court: Well, you mean you couldn't see it until you got opposite to it?

A. No, if I had got opposite to it then I could have probably seen it.

The Court: All right.

A. But I had fell before I had reached the point where I could have been able to see it.

Mrs. Alice Scarlett, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hoey:

This witness, the wife of plaintiff, corroborated the plaintiff as to his good health prior to the accident and his pain and suffering following the accident.

Exception No. 5

Thereupon the following proceedings were had:

Defendant's Motion for Judgment

Mr. Lockwood: Comes now the defendant at the close of all of the evidence and after the plaintiff has rested his case and moves the court to grant a judgment of non-suit against the plaintiff and in favor of the defendant upon the following grounds:

1st. That plaintiff has failed to prove that the defendant or its agents or employees were guilty of any negligence that caused or contributed to any injuries or dam-[fol. 61] ages the plaintiff received.

2nd. The evidence proves that the plaintiff assumed the risks of all dangers in connection with the freight car of which he complained, because the risks were ordinarily obvious and were fully appreciated by the plaintiff.

3rd. That the plaintiff failed to prove that any portion of the freight car in question was the proximate cause to the injury—to the accident and his injuries resulting.

4th. That the uncontradicted evidence shows that the equipment on the freight car complained of was in accordance with the specifications fixed and ordered by the Interstate Commerce Commission, and the plaintiff cannot predicate an action of damages upon equipment which thus complies with the orders of the Interstate Commerce Commission.

5th. While the plaintiff failed to allege any safety appliance defects, counsel in his opening statement, announced to the jury that there was a safety appliance defect, and it

would be proven but the evidence failed to show any safety appliance defect.

6th. If the case should be submitted to the jury and the jury should return a verdict in favor of the plaintiff, the court would be compelled to set the verdict aside because not supported by any evidence.

[fol. 62] The Court: Well, I can't agree with your views, Mr. Lockwood. The motion is denied.

To which ruling of the court the defendant then and there duly excepted.

Defendant's Evidence

Fred A. Isaacson, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am engineer of car construction of the Santa Fe Railway. I designed the type of car involved in this case. At the time of this accident, on August 27, 1931, the Santa Fe Railway had 7,000 of this same type of car in operation. They have had these cars in operation since 1929 and they were sent out here in this district the same year.

Q. And did the company have any cars of similar construction, and when I am talking about similar construction, I am talking about similar construction with reference to having a brace rod under the side ladder, side or end ladder, did we have any of those—that type of car in use prior to the introduction of this model?

A. Yes.

Q. And what sort of cars were they and how many did we have or how many do we have?

[fol. 63] A. They consisted mostly of stock cars and commonly called a "coal car." The car name for it is a "gondola." We had approximately ten thousand of those types of cars with an obstruction under the ladder tread, similar to a diagonal brace.

Q. And does that diagonal brace appear on all of those ten thousand stock cars and gondola cars?

A. Not in the form of a round diagonal brace. Sometimes it might be an ordinary angle, sometimes a short bracing, sometimes a "U" shaped brace.

Q. But is it a diagonal rod under the ladder?

A. Yes, sir, it can be termed that. We don't call it a diagonal rod. You would call it a diagonal brace.

Q. A diagonal brace, yes, and how long have those ten thousand stock cars and gondola cars been in general use by the defendant, that you have described?

A. Since 1907, approximately.

Q. That is both types of those cars?

A. Yes, sir, since 1907, yes.

Q. I wish, Mr. Isaacson, you would go a little more into detail and in telling us about the type of car that is involved here, the purpose of that diagonal brace, the function of it and the reason it's placed exactly where it is on those cars. You may, if you care to, refer to "Plaintiff's Exhibit No. 4," which is on the blackboard.

A. This is what is known as a modern fifty-ton box car. [fol. 64] It is a single sheathed type, forty feet, six inches, inside length. The single sheath box car is preferable due to its flush inside walls. In constructing box cars many times flat braces are used such as we have on the top diagonal corner of this car. That brace is subject to buckling and bending under stresses that are imposed on this car. Especially when put down on the bottom side, where most of the impact of your lading comes against the end wall of the car of the steel end. That brace does not act as a brace and suitable brace there due to the buckling. That is, when it buckles it curls up like that (indicating). Sometimes that buckling occurs right underneath the ladder. Now you can say almost—there are many cars in the United States and Canada that are built with flat diagonal braces across the bottom corner, but for that reason we broke away from an old practice sometime in 1924 and applied to our cars a round inch and one-eighth diagonal brace. That brace was put on there for the purpose of strengthening that car across the corner and provide means for tightening it and keeping it in shape, which supports the end and keeps it from bulging, thereby encroaching on any clearances that we might have between the two cars and causing an unsafe condition there. So far as the clearance between that rod and brace, it complies with the Safety Appliance

[fol. 65] Act, in 1912 of the Interstate Commerce Commission. And we wouldn't build a car at any time that would not comply with that act, because if we did——

Mr. Hildebrand: Now, just a minute, if Your Honor please, I don't mind having this witness tell what the construction is but I don't think it is proper for him to make an argument to the jury to justify his car, which overlooks the safety of the men, here.

The Court: Yes, that you wouldn't build a car, which probably is all true, Mr. Isaacson, but however, that is—the jury is not concerned with that—with what your company will do or not do as to whether you said you wouldn't build a car that didn't comply with the law.

A. That then is the purpose of that brace to put a suitable end weight support between the end and the side sill of the car. Now it is true that it could be put in many other kinds—many other forms, but any other form besides a flat plate such as we have on the top, would offer more obstruction than the round brace, thereby it would be necessary for us to move the ladder out further yet to get the required clearance, and because of more trouble than a round rod across the corner. The reason we don't put the round rod on the top is because it would go through the roof and thereby cause a leak. We would prefer the round rod on the top the same as we have on the bottom but there are no means of getting it through the roof. That is [fol. 66] the reason for staying with the flat brace or support at the top part of the car and going to the round brace on the bottom, and on the other hand this part of the car is not subject to impaction from the lading such as the bottom part of the car is.

Q. Mr. Isaacson, explain, if you will, in regard to how the ends of the rod are fastened and whether or not the ends of these rods in their fastenings at their extremities differ from the fastenings of the flat rods and the reason, or the advantages or disadvantages of either sort of fastenings.

A. The flat brace referred to on the top here is a quarter inch thickness by about four or five inches wide, flat bar of iron. In applying that to this portion of the car it would be riveted solid to the end and side sill and possibly and usually—it always is bolted to the sheathing on the side of the car, thereby has no means of adjustment and

when it buckles, it just buckles there. It ain't any good. You might as well not have it there at all. You might as well have the whole end of your car knocked out, but in this design you have a diagonal rod that goes through and has set-up ends and goes through a casting fastened with rivets to the end of the car and a casting fastened with rivets to the side sill. That casting has a hole cored through it, a round hole, whereby the rod can be slipped right down through both holes, and there is a nut [fol. 67] threaded—there are threads on this end and thread on that end, and there is another here with a locknut. If for some reason or other this rod becomes distorted, loosened in any way, it is simply a matter of putting a wrench on that end or this end and tightening the rod that's in a——

Q. You spoke a moment ago about a single sheath car and said this was a single sheath car. What do you mean by that?

A. It means that it is a car that is built with a flush side wall and only has one thickness of board running up the full side of the car.

Q. Previous to the introduction of these cars did the company ever have another kind of car called a "double sheathed car"?

A. Yes.

Q. And how did they differ?

A. In that it was constructed with two walls, one forming the inside lining about thirteen inches thick and with a spacer between it and an outside wall.

Q. And in those double sheath cars did you have a similar brace?

A. Yes.

Q. And how was it placed?

A. It was placed between the two walls of the car.

Q. I see, so that when you have a single sheath car and you use a brace of this sort, necessarily you had to put the brace either on the inside of the car or on the outside.

A. Yes, sir.

Q. Yes. Now if *if* the brace was placed on the inside of the car would that be to an advantage, any advantage or [fol. 68] disadvantage?

A. Nobody would ever load the car because of the obstruction on the inside of the car.

Q. I see. Now returning again to the double sheath cars, has this car any advantage over the double sheath car?

A. Many.

Q. In other respects? What are some of them?

A. It is less vermin proof. It doesn't get so infected with bugs that get into the grain and flour and other cereals that — shipped in a box car. It is much cleaner. They are, on account of the flush walls, shippers prefer this type of a car because they can load boxed commodities, which we have more of today, or packaged commodities, and put them into the car with the flush side wall, thereby not damaging the commodity hauled and it has no projections extending on the inside wall from the floor to the roof.

Q. Now, Mr. Isaacson, state whether or not there is any strain to the end of freight cars requiring this kind of a support to strengthen the ends of the car.

A. There is an enormous strain on ends of the cars due to the impact that the car gets in moving over the railroad. The coupling and uncoupling, the shift of commodities to get over the end and get jammed, endeavoring to shove the ends out. That is the worst thing that we have got to contend with in car construction, is to get an end of sufficient strength to withstand that impact.

[fol. 69] Q. And is it to strengthen the end of the car and those ends of cars that this rod is chiefly put on there for?

A. Absolutely.

Q. Are you familiar with the requirements of the Interstate Commerce Commission as to clearance of those side ladders from the car?

A. Not only that but every other part of the car.

Q. And state, Mr. Isaacson, whether the clearance of the side ladder on this type of car complies with the clearance fixed and set by the Interstate Commerce Commission?

A. Yes, sir.

Q. And state what is the clearance fixed by the Interstate Commerce Commission?

A. Two inches.

Q. And what is the clearance on this type of car?

A. Their drawing called for two and three-quarters inches, sometimes slightly over, slightly under, due to variation in construction.

Q. But do they in all instances exceed two inches?

A. Not in any case.

Q. Beg pardon?

A. In no cases do they—you mean exceed?

Mr. Lockwood: Read the question again to the witness.

A. In every case?

Q. My question wasn't very clear. I will put it this way: in the construction of these cars, are there any of them but that do not have at least a clearance of two inches?

[fol. 70] A. No cars are operating on our railroad with less than two inch clearance.

Q. Or were there on August 27th, 1931?

A. No.

Q. Now in regards to another matter. Is there an association in the country known as the "American Railway Association," sometimes referred to as the "A. R. A."?

A. Yes, sir.

Q. State to the jury what that association is, just very briefly.

Mr. Hildebrand: Well, I will object to any testimony along that line as being immaterial, if Your Honor please.

The Court: Well, it is a preliminary question. Objection overruled.

A. It consists of an association that is supported by all the railways of the United States and Canada. It is for the purpose of suggesting and recommending fixed standards for interchange.

Q. Now state whether or not, Mr. Isaacson, if the American Railway Association have had anything to do with the approval of this type of equipment.

A. The car complies with all the requirements of the American Railway Association.

The Court: Well, now, of course, there is the difficulty. There is where the objection should come in probably, is right at this point.

Mr. Hildebrand: Yes, I will ask that [illegible]nt be stricken.

[fol. 71] Exception No. 6

Thereupon the following proceedings were had:

The Court: Now, as I take it, just let me read that act, that section of that act.

Mr. Hildebrand: Section 11 of the act here. (Handing book to court.)

The Court: I wish to instruct the jury and state to the jury—what is the title of this act?

Mr. Hildebrand: It is Federal Safety Appliance Act.

The Court: The Federal Safety Appliance Act, section 11 of that act. Among other things prescribed, "All cars——"

Mr. Lockwood: Just a moment, Your Honor, the defendant——

The Court (reading): "requiring secure ladders and secure running boards——"

Mr. Lockwood: May I interrupt the court a moment?

The Court: Yes.

Mr. Lockwood: The defendant will have to object at this time to the court quoting the law to the jury at this time.

The Court: The objection overruled. (Reading:) "that all cars requiring secure ladders shall be equipped with such ladders and running boards." Now there is nothing in the act here that states what a secure ladder is and that is a question of fact that is at issue in this case, is a [fol. 72] secure ladder. What is a secure ladder? With that the court has nothing whatever to do. That is question of fact. Proceed.

To which ruling of the court the defendant then and there duly excepted.

Q. Now, Mr. Isaacson, basing your opinion upon your experience as you have testified here, I wish you would tell the jury whether or not the side ladder on this type of car involved in this case is safe equipment.

Mr. Hildebrand: Well, now, just a minute, if Your Honor please; that is objected to as not being a proper subject of expert testimony. That is for the jury to decide, the very question involved in this action.

The Court: Well, I think that a railroad man, a man who has had years of experience in building cars and designing cars and seeing cars used can testify on that just the same as probably you have an oportunity of men who are experienced in that thing in saying it is not a secure ladder. However, I wish to caution the jury that that is a question

of fact which rests exclusively with you as to whether or not this ladder in question is a secure ladder. Proceed.

The Witness: Will you read the question again?

(The question read by reporter.)

A. Absolutely safe.

Q. And give the reasons for your opinion.

A. The side ladder on this car is attached to this end [fol. 73] here (indicating) strictly in accordance with the Interstate Commerce requirements that require it to be safe, and specify the size of the rivets or bolts that you must use. It is put on there with the size of grab irons which is a maximum of five-eighths diameter that you should put on there. It is put on there with that. It is riveted with this guard leg of the ladder, with the guard rivets specified and it has the required clearance all the way around every brace on the car. It is located the required distance from the end of the car or from the fender of the coupler specified by the Interstate Commerce Commission. It is exactly in every detail in accordance with all requirements put around that ladder for safe and economical operation.

Mr. Hildebrand: Well, I move that the last statement of the witness be stricken, Your Honor, as pure conclusion and invading the province of the jury as to whether it is safe for the men in going down the ladder.

The Court: Yes, that's what we have got in mind. I don't think there is any question involved here about it being fastened securely to the car or that the ladder, itself, being strong; the question is whether that is reasonably safe to use, that's it.

A. It is.

Q. And basing your opinion upon your experience that you have testified to here, state whether or not in your [fol. 74] opinion that ladder and the grab irons on that ladder are secure.

A. They are.

Q. And basing your answer upon your experience state, Mr. Isaacson, whether or not this rod that you have referred to behind the ladder is in any way calculated to interfere with the free use of the ladder or to cause the ladder or any part of it to be insecure.

A. It no way interferes with going up and down the ladder and doesn't interfere with the ladder being secure to the car.

The Court: Well, what do you mean by "security"?

A. Attached with the proper number of rivets.

The Court: Well, but is that what you are referring to only, it being secure with a certain number of rivets?

A. It is secured with the required number.

The Court: Well, but I think the question is, Mr. Isaacson, is it secure to use?

A. It is.

The Court: All right.

Q. Well, is it safe to use?

A. It is.

Q. And since the 7000 odd cars of this description, of this character, have been in general use since 1929, have you ever known any accidents attributable to this rod?

Mr. Hildebrand: Well, now just a minute. That is calling for a conclusion that this man obviously wouldn't be [fol. 75] able to give and what his knowledge might be, there might be one thousand cases of this kind and he never knew it.

The Court: Well, I know but the question is all right. If Mr. Isaacson states whether or not he knows if there ever has been an accident on one of these ladders, I say, of course, of your own knowledge.

A. None ever been called to my attention except this one case.

Q. And in regard to the ten thousand other cars being the stock cars and gondola cars that have a bracing, diagonal brace behind the ladders, have you known of any accidents attributed to those—arising on those cars where it was caused in whole or in part by that brace interfering with the free use of the ladder?

A. There is none been called to my personal attention, but there has been some tripping on the obstructions or projections under the ladder tread.

Q. Yes. Now, Mr. Isaacson, that leads me to another subject for the time being, forgetting this type of car that is involved in this accident and forgetting also the gondola and stock cars which you have just referred to, but referring to the rest of the cars, the rest of the boxcars in use

on the Santa Fe and on any other roads. By the way, are you familiar with the type of equipment on any of the other railroads?

A. I'll tell the world I know them all.

[fol. 76] Q. All right. Now tell the jury whether or not there are any projections from the side of the car on any of those numerous classes of cars in general use on the railroad?

A. There is hardly a car running in the United States or Canada that does not have some projection underneath the ladder that would cause a man to trip or that might cause a man to trip on.

Q. All right. Now name some of those.

A. Railroads or the cars?

Q. No, any from the kind of cars—I mean from the projections or obstructions?

A. They might consist of a rivet head, of a nut or a bolt, a bolt head, a flat brace, a wooden brace, an angle, a bracing; it might be in the form of a lug. I think that is about all I can think of right now.

Q. Did you see this Southern Pacific car down here on the track by the depot yesterday?

A. Yes, I have seen it.

Q. Do those—examine those photographs and state whether or not they correctly portray the appearance of that car that stood there yesterday.

A. They do.

Q. The same car is standing there today. I don't know whether you saw it today or not.

A. I did not.

Q. Now is that a type of car in common, general use?

A. It is.

Q. That is the Southern Pacific car, is it?

A. Yes, sir.

[fol. 77] Q. Describe that—the construction of that car. I mean with reference to the end? I am referring particularly to any obstruction on, behind the end ladder on that car.

Mr. Hildebrand. Was that in use in 1931? Then I won't object if it was.

A. In use before then.

Mr. Hildebrand: All right. Go ahead.

A. That particular car, that Southern Pacific car you talked—spoke of has an end ladder, not a side ladder, underneath that end ladder is a diagonal—there is a diagonal post, not a brace. It is part of the end framing of the car. It runs from the end sill to the roof and it is made in a "U" shaped form rather than a rod and has two prongs sticking up under the ladder that extends down past—three, I believe, I don't recall just exactly. I believe it is three ladder rungs. If there would be any danger it might be classed as a little bit more than this diagonal brace, although I feel that there is no particular hazard in that car either.

Mr. Lockwood: Now these photographs are offered in evidence as a part of this witness's testimony, explanatory of the illustration he has just given.

Mr. Hildebrand: No objection to these at all.

The Court: How many photographs are there?

Mr. Hildebrand: Five.

[fol. 78] The Court: The five photographs referred to are received in evidence; may be marked "Defendant's Exhibit No. 4, a, b, c, d, e."

Mr. Clerk: Number, "Defendant's Exhibit No. 3, a, b, c, d and e."

The Court: Oh, "Defendant's Exhibit No. 3, a, b, c, d and e."

The Clerk: Yes.

Q. In other words, Mr. Isaacson, there are plenty of places to catch a man's toe in going up and down ladders if a man doesn't exercise ordinary care?

A. All he has got to do is to stick his foot in there a little further.

Q. Now, there is another type construction that I would like to have you talk about. I have noticed in looking over freight cars in yards and on tracks that a very large number of cars have what I might call a corrugated end, it looks something like the old washboard. I have noticed the ladder, the end ladder, right up the end of that car over that corrugated end. And I will ask you to tell the jury what type car it is that has those corrugated ends and whether or not that is a type of car in common use.

A. All box and gondola cars built in the past few years have that type of an end. There may be some difference

in the shape of the corrugation but practically all of the cars built, and there are thousands of them, that have those ends with those projections.

[fol. 79] Q. And what is the purpose of that corrugation?

A. To add strength again to the end to withstand the impact of the lading.

Q. And is it common practice to have an end ladder right over that corrugated surface?

A. It is a requirement.

Q. And is it possible for brakemen going up and down those end ladders to let—have their toe come in contact with the corrugated ends and slip off and consequently slip off of the ladder too?

A. It is possible.

Q. Yes, and would there be any additional hazard in a man's slipping between the ends of the cars rather than from the side of a car and, if so, what would that be?

A. He has got a chance if he slips from the side of the car but he has no chance hardly, if he falls from the end of the car, the chances are there he would be run over.

Q. Yes, and even with those corrugated ends of the cars that you say are in general use, have you ever heard of any complain-s of that corrugated end being any particular hazard for a man using those end ladders?

A. None. None to my personal attention.

Cross-examination.

By Mr. Hildebrand:

Q. Now you were primarily interested in constructing this car to get a brace there that would give you the maxi-[fol. 80] mum amount of efficiency in the corner of that car from the standpoint of making the car length longer and give you more service, isn't that true?

A. Sure.

Q. And consequently you designed that type of brace to do that, didn't you?

A. It is the best brace for that purpose.

Q. Yes, you do admit, don't you, that that rod there if a man is coming down there, say at night, he steps down there and doesn't appreciate that it is there, he hits his foot with it, that it will cause him to slide down?

A. If the man wants to put his foot in there far enough, further than prescribed by the Interstate Commerce Commission, yes.

Q. Do you mean to contend that the Interstate Commerce Commission provide how far a man puts his foot or how long his foot should be?

A. Well, they do to a certain extent because——

Q. Well, you tell me and show me where that provision is, I would like to see it.

A. The only extent is that they provide a limited clearance of two inches and that should be the limit of where the man should put his foot.

Q. Oh, at the point where the man would put his foot he should put his foot just two inches in, is that right?

—. ——.

Q. Do you mean to say that a man should use only two inches of his foot when he goes down to hit the rung at that particular point?

[fol. 81] A. If there is an obstruction there, that is all he could use.

Q. Is there any provision of the Interstate Commerce Commission that applies to that?

A. The only part of the Interstate Commerce Commission that we comply with is to see that the clearances that they give are specified.

Q. You are only interested in constructing these cars with the technical compliance with the requirements as to clearance, irrespective of whether or not they are safe, isn't that true?

A. The Interstate Commerce Commission already established that.

Q. Now let me ask you this, Mr. Isaacson; as a matter of fact there are a great many ways of achieving this same bracing effect to the end of a car without doing it with that particular kind of brace rod, aren't there?

A. Sure, it could be done in many ways.

Q. For instance, you could in making these cars, in steel construction you could run a little groove in along in the car there and imbedded that brace rod in the groove, couldn't you?

A. No.

Q. You couldn't do that? You are positive of that?

A. The thickness of the lining is such that you could cut

the lining in two and cause it to rot when the water hits it all the time.

Q. Do you mean to say when you are manufacturing these [fol. 82] cars, that you couldn't run a groove in there of some kind?

A. Oh, we could if you want to take that. Suppose we don't want that there?

Q. You don't want the groove then?

A. No, I should say not.

Q. All right. You couldn't possibly — imbedded that brace there? Is that your positive testimony?

A. Both the inside diameter is specified to meet the shipper's requirement, nine feet two inches; the outside over all clearance would not allow you to imbed the rod without impairing the strength of the side boards and cause decay in the boards where the groove is cut, due to water.

Q. Well, you could use a flat bar down here, the same as you use up there and get the same bracing effect, couldn't you?

A. No, sir. That flat band buckles and doesn't support the corner.

Q. Well, it is used by practically every other railroad who want to get this bracing effect, isn't it, the bar, the flat bar?

A. It is used by a great many railroads but they have that objection to it. It does not act as a brace after it buckles. Just the same as a string—just as long as a string is taut and straight it supports, but you couldn't support anything with a kink in the string.

Q. As a matter of fact the Santa Fe are the only people who use this particular device, aren't they?

[fol. 83] A. Well, I—there are some of the other railroads that use them on other than boxcars. We probably——

Q. Well, I mean on a boxcar of this type and construction, the Santa Fe are the only people who use these diagonal brace rods, aren't they?

A. Well, I will have to think of that a little bit. I don't recall any others right now, no.

Q. And you are the man who is responsible for the Santa Fe's using them, aren't you?

A. On this particular car, yes.

Q. Well, this is the only type car you use them on, isn't it?

A. No, sir.

Q. What other type car do you use this particular diagonal rod on?

A. A double sheathed boxcar.

Q. How long have you had that in service?

A. Since 1924.

Q. And is that underneath the ladder in this same fashion as this?

A. It is between the inside and the outside—the inside sheathing and the outside—the inside lining and the outside sheathing.

Q. Oh, well, it doesn't interfere with a man's footing in any way, does it, in that type of car?

A. This one doesn't interfere with anyone's footing.

Q. Well, we will leave that to argument, but the other one doesn't interfere with a man's footing when it is buried in the sheath?

A. Well, it would be buried in there.

[fol. 84] Q. So you are responsible for the Santa Fe, in this type of equipment, using this sort of diagonal brace rods, is that true?

A. Sure, we introduced it on our cars.

Q. Yes, and don't you know as a matter of fact that the other companies don't use it?

A. Oh, it is—every railroad in the United States builds a car of that type of construction and they have some form of a brace on the corner.

Q. But they don't use that form that you devised, do they, that diagonal rod?

A. Well, they use the flat piece, but they have the trouble that we formerly did have.

Q. Answer the question, please. They don't use that diagonal rod that you devised, do they?

A. No, not exactly that type but it answers the same purpose.

Q. It isn't the kind of brace rod that comes out from the body of the car that runs diagonally behind the ladder that these others use, is it?

A. They all use a brace that runs underneath the ladder.

Q. Yes, they use a brace like this one here in this photograph, don't they, that is flat, a band where they use a brace at all; it is right up against the body of the car, isn't that true?

A. Oh, they all don't use that kind of a brace.

Q. Well, is there a single railroad—you said you would tell the world that you knew them all—is there a single rail-
[fol. 85] road that uses a brace rod of the kind that you devised that comes out and rests out seven-eighths of an inch or some distance from the side of the car?

Q. Would you answer the question, please?

A. I don't recall any particular railroad at the present time that uses that exact brace.

Q. Now is there any other road that uses a feature like that?

Mr. Lockwood: The same objection that I have just stated. We contend that when we build a car in compliance with the standards fixed by the Interstate Commerce Commission——

The Court: Well, but that is for the jury to decide whether or not that is in conformity with the standards.

Mr. Lockwood: Well, there is no conflict on that.

The Court: Well, Mr. Lockwood, in regard to driving automobiles, in the vehicle law there is one general provision—there are lots of special provisions—you mustn't drive without lights, you must drive on the right side of the road and a lot of provisions, but there is the general provision that you must drive carefully at all times having due regard to the condition of the highway, but they don't say what that is, and that is a matter that is left entirely in the hands of the jury, for the jury to determine whether or not that a man was driving carefully. Now, as I read this act [fol. 86] and the plaintiff's contention is this: that the law provides that secure ladders will be placed on all trains. Now the question is for the jury to determine, whether or not this was a secure ladder, although the law provides, or the commission provides that there must be two inches clearance. That is simply the same as the automobile act, that you must not drive without lights, but it don't say that is the only thing you are to do.

Mr. Lockwood: Well, but Your Honor, you are referring now to the Safety Appliance Act and there is no Safety Appliance Act treated in this case, or a violation of it.

The Court: Well, we are getting back, of course, to another question that we haven't thrashed *that* out yet. We are getting back to another proposition entirely. Now I am assuming that the Safety Appliance Act is pleaded.

Mr. Lockwood: Well, I thought Your Honor was not making that observation but we have contended throughout this case that no Safety Appliance defect has been pleaded here.

The Court: I know, you have contended that, but I say now in the argument that we had there was nothing said about it not being pleaded, at least you didn't go into that.

Redirect examination.

By Mr. Lockwood:

The photograph received in evidence as "Defendant's [fol. 87] Exhibit No. 4" is that of a BX 11 car. A car of the same class and series as involved in this case. The photograph received in evidence as "Defendant's Exhibit No. 6" shows the steel framed sub-structure and underframing of the same class and series of cars. In other words, it is a car before either the sides or the floor or the roof have been put on. It belongs to the same class as involved in this accident. The photograph marked "Defendant's Exhibit No. 7" is a photograph of the stock car in the S K T class and illustrates my testimony in regard to having stock cars with braces underneath these side ladders. The photograph marked "Defendant's Exhibit No. 8" is an end view of the stock car showing diagonal posts back of the ladder tread. This illustrates my testimony in regard to having other cars with braces underneath the end ladder. On August 27, 1931, we had in use 500 of the particular cars shown in Defendant's Exhibit No. 7, and 1800 of a similar type, almost identical. On this BX car that is shown in Defendant's Exhibit No. 4 the rod is in exactly the same position as that on the car on which the injury occurred.

Q. How about the distance between the ladder tread and those braces on the stock cars? Approximately the same?

A. It is the same.

Q. That is the standard clearance fixed by the Interstate Commerce Commission?

A. Yes, sir.

[fol. 88] The class of car involved in this accident can be distinguished from the ordinary freight cars when one is up on top of the car and looking at the hand brake. They

differ in their application from the hand brakes on most of the old cars. On these BX cars, which is like the one involved in the accident, we have what we call vertical hand brakes on the end of the car. The wheel on the hand brake is vertical, and on the older cars the wheel on the hand brake is horizontal. The brake on these BX cars is an Ajax power brake, an improved type of brake.

Recross-examination.

By Mr. Hildebrand:

Plaintiff's Exhibit No. 5 is a fair representation of the character and type of brace rod as shown in the blueprint, Plaintiff's Exhibit No. 4. I am familiar with the character and type of construction of the car shown in Plaintiff's Exhibit No. 6; that is a standard method of construction employing a flat brace in the corner of the boxcar. It is used by the Chicago, Milwaukee, St. Paul and Pacific Railway, the Rock Island and the Southern Pacific; also the Missouri Pacific, Chicago Great Western and the Western Pacific. Plaintiff's Exhibit No. 7 is a familiar arrangement used before either this one or the one you have just presented. [fol. 89] There are thousands of cars in general use without any brace under the ladder at all. These are either double sheath cars or all-steel cars.

Q. Now, Mr. Isaacson, there are, of course, thousands of cars in use on different lines without any brace at all, in the corner, isn't that true?

A. Double sheathed cars, not the single.

Q. No, I mean thousands of boxcars in general use without any brace at all?

A. Yes.

Q. So that when a man comes down the side of one of these boxcars he may come down in fifty per cent of the cases, he may come down cars that have no brace of any kind or description connected with the ladder, is that true?

A. Oh, yes, any all steel car doesn't have a brace.

Q. Yes.

The Court: Now, Mr. Hildebrand, connected with the ladder.

Mr. Hildebrand: I mean underneath the ladder.

The Court: All right.

Q. So on the recent construction, however, as I understand it, the newer cars have this brace of one type or another in the corner, is that correct?

A. We found that it was necessary to support that corner to keep it from bulging out.

Q. All right.

A. Especially I would want to be corrected on that because it is only the wooden cars. All steel cars don't need [fol. 90] the brace because they have a whole flat sheath on the car that acts as a brace.

Q. Now did you ever go out on the road and see any brakeman using this device that you originated on this newer type of cars as shown in your blueprint?

A. Oh, yes, I have seen many brakemen go up and down.

Q. And have you ever observed these particular cars with reference to whether or not the point where the brakeman's right foot would come down was worn from brakemen's feet having hit the rod at that point?

A. Oh, you could see that on any car. The braces, the toe marks, are on the side of the cars or on the projections that are out there.

Q. On any cars that have been in use for any period of time you can see that where brakemen have slipped on that rod, can't you?

A. Oh. I wouldn't call it slipping. But the foot has come in contact with either the side of the car or whatever projection there is.

Further redirect examination.

By Mr. Lockwood:

Q. As a matter of fact, isn't it a fact that on practically every freight car that you ever see which has been in use any length of time at all you look at the side of the car beneath the ladder and you will see toe marks on the side of the car?

A. Sure.

[fol. 91] Q. And where they have these bolts or bolt heads on nuts and the bolts projecting out from the side of the car, isn't it a fact that invariably you will see marks on those?

A. Yes.

Q. And braces of any type, whether they are flat braces up against the car or whether they are any other kind of

braces other than the type used here, isn't it a fact that on those cars you will find the marks of shoes behind the rungs of the ladder in those instances?

A. Sure.

Q. Now referring to Exhibits 6 and 7 again (Plaintiff's Exhibits 6 and 7) and particularly to those braces from the standpoint of car construction as well as safety, would you say that those braces there shown are as practical and good as the brace in the car in the class involved here?

A. Insofar as car construction is concerned a flat brace of this type buckles and loses its tension as a brace and——

Q. Now, by the way——

A. (Continuing.) —and in doing that sometimes buckles right in line with the ladder.

Q. Yes. Now has the Santa Fe System had experience for years with that old type of brace?

A. Yes.

Q. And is it from your experience that that flat type of brace in buckling, was that one of the things that was taken into consideration when this rod, adjustable rod was placed in there as a brace?

[fol. 92] A. That was the main reason for doing that, to get a brace that you could adjust and keep tight.

Q. And one that also didn't get out of place?

A. Yes, sir.

Q. This type of brace shown in Plaintiff's Exhibits 6 and 7, being flat braces bolted or riveted to the side of the car, is there any way to tighten those braces at all after they become loose?

A. The only way you can tighten them is take them clear off the car and go to the blacksmith shop and drill some new holes and relocate them and take the stretch out of them.

Further recross-examination.

By Mr. Hildebrand:

Q. And that is what every other railroad that you know of does, isn't it?

A. They don't do it. They let them stay buckled.

Q. Well——

A. Sometimes they drive them in with a sledge on the side.

Q. Drive them in and they add a few bolts and they keep them in repair, don't they?

A. But it loses its strength as a brace.

Q. Well, does that flat bar of yours, that is on top there, you have put the flat bar of the same type that the other railroads used up on top of your car, haven't you?

A. Yes, because they are not subject to the stresses and strains there that they are at the bottom. But we would [fol. 93] have liked to have had a rod up there but it would cause a leak in the roof and inconvenience to get up there and tighten them up on the roof.

Further redirect examination.

By Mr. Lockwood:

Q. And when these flat rods buckle do they bulge out from the surface of the car?

A. Yes, sir, I have seen them as much as two inches.

Q. I see. That is out as much as two inches and causing a safety defect?

A. Yes.

Ovid L. Wright, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live in Richmond, California. I am general foreman of the car department of the Santa Fe Railroad Company and have held this position since July, 1909. I was foreman on the repair tracks for two years before that and was car repairer from 1896 on until that time. I have general supervision of all car repairs at the Richmond shop. I look over approximately 1,000 cars a month. In the past few years it has run as high as 3,000 a month. I have observed the different types of cars in use and have gone up and down the side and end ladders of same. I have observed [fol. 94] the type of braces that the freight cars have on the sides and near the ends of the cars. I am familiar with the type of car involved in this lawsuit. These cars have been in use in California since 1929. Brakemen, car in-

spectors and repairmen use them constantly in connection with their work. Basing my opinion upon my experience and observations as testified to here, it is my opinion that the side ladder on the class of cars involved in this accident is safe and secure for brakemen and others to use; and basing my opinion upon my experience as testified by me here it is my opinion that the brace or anchor-rod that goes under the side ladder and is between the side ladder and the side of the car is in no way calculated to interfere with the free use of the hand holds or rungs of the side ladder. They have a full clearance as prescribed by the Interstate Commerce Commission. I have had no complaints whatever about any of the employees having any difficulty in using cars so equipped when they are using the ladder, other than what I have heard in regard to this case. I have never heard of any accident attributable to or claimed to be attributable to this brace rod in any way other than the case involved here. Almost all freight cars have some projection out from the side of the car underneath the side ladder. These projections consist of bolts, rivets, nuts or [fol. 95] bands and braces on the end of the car and what is known as the corner iron, it has rivets and bolts that protrude also there are braces, rivets, filters, angles, that in the construction of freight cars are allowed to project out. They have to project out to fasten the car, to hold the car together, but the ladder irons are always required to be kept in the clear. Boxcars mus thave some braces to keep them in shape and support them. There is a great deal of weight that comes on the end of the car, principally in switching cars, and when the cars strike each other there is a tendency to shift the load. If you want to keep the end in this car you have got to brace it. I am familiar with the corrugated ends of boxcars. I really think there is much more danger of accident happening in connection with ladders over these corrugated ends than there is on side ladders with any type of brace underneath, and as far as catching the toe or having the toe slip in using equipment there are hundreds and thousands of braces on cars and in railroad yards that an uncareful workman can stub his toe on and fall. He can slip in many places. He can always slip off the grab iron. Basing my opinion upon my experience I do not see anything about this new type of car involved in this case that has any hazardous or dangerous

features in connection with the use of the side ladder. It is up to the Interstate Commerce Commission requirements [fol. 96] in regard to safety appliances and as far as the actual danger in using that ladder, the ladder on this type of equipment involved in this case, I do not see any danger to the safety of the workmen.

Cross-examination.

By Mr. Hildebrand:

The Federal Safety Appliance Acts require ladders to be safe and secure. On every one of these brace rods of the type shown in this blueprint at a point a little above the rung of the ladder where the brace rod crosses in back of the ladder, the brace rod shows foot marks.

Q. And can you tell me of any other devices behind a car —behind a ladder on a car which is at a slanting angle and out from the body of the car itself, as this device in this blueprint is?

A. These bolts and nuts and angles.

Q. Well, they are all attached to the body of the car itself, aren't they?

A. Yes, sir.

Q. And when a man hits an object of that kind, if we will say this is a bolt here, his foot would simply go over there and on down, wouldn't it?

A. He would on a bolt but on an angle it would have a slipping tendency.

Q. Well, is there anything that is along the side of the car at an angle and out free from the surface of the car or the side of the car at an angle aside from this brace rod in this particular type of car?

A. Yes, there is some rivets down towards the corner iron.

[fol. 97] Q. Well, they are attached to the side of the car itself, aren't they?

A. Exactly.

Q. I am asking you if there is anything that isn't attached to the side of the car but is out free and clear about an inch from the side of the car and at a slanting angle behind any ladders on any car that you know of except this particular type of brace rod?

A. Setting free from the siding, as I understood the question?

Q. Yes, surely.

A. I do not know of any. On other freight cars there are bolts, nuts, angles and rivets on the side of the car and behind the side ladder. I do not know of any other cars that have anything attached to the side of the car but what is free and clear about an inch from the side of the car and at a slight angle behind the ladders.

Redirect examination.

By Mr. Lockwood:

On stock cars we have braces similar to the one involved in this case. We have had these braces on stock cars quite a few years. I would say since 1923 and possibly longer. This brace on stock cars is similar to the brace used on the class of cars involved in this case. Some of these cars have wooden and some steel braces and all of them are placed behind the side ladder. On these cars the clearance was the same as on the car involved in this case. Everything on clearance is based on the Interstate Commerce [fol. 98] Commission standard. There must be two inches clearance. The side ladders on our freight cars have got to have a standard clearance.

William O. Parks, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live at Richmond, California. I am a railroad conductor and have been for 19 years for the Santa Fe Railroad. I was conductor on the train when Mr. Scarlett was injured. I did not see the accident. I saw Mr. Scarlett soon after the accident, at the point where the accident happened. I had some conversation with him in regard to the accident. I was talking to him about 15 minutes after the accident. His mind appeared to be clear. I asked him how the accident happened and he told me that he did not know how it happened. I asked him if he fell from the car or what caused it and he said that he was coming down the side of the car but he did not know what caused it. Mr.

Scarlett appeared to be in possession of his mental faculties. I asked him if he was badly hurt and he said that his two wrists seemed to be hurt and his back and the back of his head. He said he thought it was on account of his gloves being oily that he slipped from the handle. I was [fol. 99] present when Mr. Anderson took a statement from Mr. Scarlett. This was at Mr. Scarlett's house on Eighth street, in Richmond. I heard most of the conversation that was carried on. Mr. Anderson asked him how it happened and Scarlett said that he didn't know. He said that he thought it was an accident and that's all. I saw Mr. Anderson writing something down. I was there when Mr. Scarlett signed it. I wasn't paying any particular attention to the conversation but I heard parts of it. I heard Mr. Scarlett tell Anderson that he did not know how the accident happened.

Mr. Scarlett has been working for me as brakeman many times. Sometimes he acted as rear brakeman. It is the duty of a rear brakeman to prepare the switch list. These thirty-three cards about 4x8 inches in size that you just handed me are switch lists. (Page 550 of the transcript.) These switch lists give the numbers of the cars in the train. When the rear brakeman goes on duty he starts at the caboose and takes the number of each car in the train on a list of this kind. These switch lists consisting of these thirty-three cars are in the handwriting of the plaintiff. They are all Mr. Scarlett's figures except a few on the head end of the train there that I inserted myself and some other conductors have inserted on their lists. (These switch lists [fol. 100] just referred to were received in evidence, Tr. p. 240, and marked "a, a-1, b, b-1, c, c-1." The Court: Each letter will give us two exhibits and there are thirty-three and they will all be taken care of by the letters of the alphabet.) This other switch list marked "Defendant's Exhibit A for Identification" is in the handwriting of Mr. Scarlett. (This received in evidence, Tr. p. 241.) On the switch list marked "Defendant's Exhibit B for Identification" the first 26 cars listed are in the handwriting of Mr. Scarlett. (This received in evidence, Tr. p. 241.)

These three little books that you just handed me are my train books covering the period from April 12, 1931, until September 30th, 1931. These books are used by the conductor to write in all of the numbers and the contents of

the car and the destination and the weight as taken from the waybill on loads and from the actual weight on the car itself. It is really a record of everything that pertains to the trip. It gives the symbol of the train, the engine number, the date and time you leave, the date and time you arrive, and the engineer, fireman, conductor and brakeman. It is a complete record of the trip. The entries are made in the book at the terminal that you leave from and all entries of cars set out or picked up en route. These are my personal records.

[fol. 101] This bunch of loose papers here, called "Form 827, Standard", and about 4x8 inches in size, is what is called our "827 report" and is our delay report on one side and time slip on the other side. These give the amount of delays and stops and the cause. Mr. Scarlett was head brakeman on my train on June 5, 1931, that carried ten cars of the same classification as the one involved in this accident. One of our cars, number 125582, was the same type of car as is involved in this accident. It was in the train out of Calwa and moved to Richmond. Another car of the same class was 128607. Another car of the same type was 125401. This originated at Calway and moved to Richmond. Another car of the same type was 128798, which originated at Calwa and was set out at Port Chicago. It would be Mr. Scarlett's duty to set that car out. There were two cars set out there and it would be necessary for Mr. Scarlett to set the brake on the head car of that cut; the head car of the cut being 128798 and was a car of the same class as the one involved in this accident. In order to set the brake on this car he would go up one of these side or end ladders. The stop to set these cars out was at 1:38 P. M. We stopped twelve minutes. Car 128579 was another car of this same class, in the train. It originated at Calwa and was set out at Morman. It would be Mr. Scarlett's duty to cut off behind this car and set this out. [fol. 102] It would be Mr. Scarlett's duty to throw the switches to make this move and to stand at the switches while these cars went by. This was in the daytime at 11:15 A. M. Car 125245, of the same class, was also in the cut. It was picked up at Morman and returned to Richmond. Scarlett would assist in picking up that car. Car 126279 was also the same kind of a car. It was picked up at Morman and moved to Richmond. It would also be Mr. Scar-

lett's duty to assist in picking up that car. Car 12761 was also of the same class, moving from Morman to Richmond. Mr. Scarlett would also assist in this. Car 125967 was another car of the same class that moved from Morman to Richmond; also car 129250 was picked up at Morman and left at Pittsburg. It would be Mr. Scarlett's duty to set this car out at Pittsburg, and also to set the brake on that car. To set the brake he would go up the side or end ladder to do it. We arrived at Pittsburg at 1:10 P. M. and were there ten minutes. On June 6th to 7th there were six cars of the same class as involved in this accident on the train when Mr. Scarlett was one of the members of the crew. This train left Richmond at 9:35 P. M. on June 6th, 1931. Mr. Scarlett was rear brakeman on this date. It would be his duty to make the switch list. The two cars of the same class out of Richmond that moved to Calwa, were in this [fol. 103] train; there was another car of the same class out of Richmond that moved to Riverbank; also one car of that class that moved from Antioch to Mormon. My delay report shows that there was twelve minutes delay at Port Chicago and it is customary and required of a brakeman to make an inspection of the train at Port Chicago while the head brakeman makes a set out of cars at Port Chicago. That inspection consists of observing the running gear and everything pertaining to a train. There is a rule of the company in regard to inspection that has to be followed by the brakeman. This rule is known as "Rule 414." This refers to the duties of a brakeman. "Rule 411" pertains to a brakeman and also "Rule 414". This all comes under the head of "Duties of a Brakeman." The rule book containing this rule is required to be carried by every employee in train service. Rule 414 of the rules and regulations of the Operating Department of the 1927 Revision is as follows: "They (brakemen) must inspect carefully at each stop the condition of journals, wheels, brakes, handholds, stirrups, ladders, and coupler apparatus, and if anything in connection therewith is out of order, it must be immediately reported to the Conductor. This rule will apply to cars in their trains as well as those handled at stations in switching."

[fol. 104] Exception No. 7

Thereupon the following proceedings were had:

The Court: Ladies and Gentlemen of the Jury: The law does not allow the judge in any case being tried by a jury to intimate in any way what the facts are in any case or what credit you should give to the testimony of any witnesses in the case or to express any opinion that would tend to influence the jury in any way in arriving at a question of facts other than legal instruction. However, it is the duty of the court and it is also the duty of attorneys on both sides to present a case in such a manner that the jurors can arrive at a legal conscientious and intelligent verdict: Now, I wish to direct your attention, at this time, this case seems to be—to take considerable time and there is a lot of evidence and there are quite a few issues of fact involved and quite a few issues of law that it wouldn't be surprising that men and women from the ordinary affairs of life might get or might not get a little confused with all the issues.

Now you will keep in mind that there are at least two quite prominent issues in this case—we will not say how many there—but there are two that are quite prominent, that is this: the plaintiff claims that this brace rod or stay rod or whatever you may call it, in the manner in which it was constructed was negligent, which, of course, I have got [fol. 105] nothing to do with that, and I am not expressing any opinion in any way about it, whether it was reasonably safe or was not reasonably safe. That is a matter that entirely rests with you. I have got nothing to do with that, but, however, what I want to call you- attention to: the mere issue, the plaintiff alleges that this was an unsafe—he also alleges that this was unsafe—which he alleges to be an unsafe contrivance that caused him to fall off the train. Now, those are distinct propositions and the burden of proving them both is upon the plaintiff. For instance, as far as you are concerned in this case, if it was not this rod that caused the man to fall it wouldn't make any difference whether or not it was negligence in maintaining that. It is up to the plaintiff in this action, to establish those two propositions, because if the rod had nothing to do with his falling off the train, why, it doesn't make any difference whether maintenance of the rod, so far as this case is concerned, was negligent or was not negligent, so

you will please keep that in mind, that there are two distinct propositions there. We will take a recess until one—by the way—what about that question of law we were discussing, about that question of the pleadings?

To which ruling of the court the defendant then and there duly excepted.

[fol. 106] DR. LAWRENCE CHAFFIN, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am a surgeon. I am a graduate of Harvard Medical School; class of 1917. I served at the Massachusetts general hospital from 1917 until the late fall of 1921, excepting about eight months service in the United States Army. All my training was in surgery. I am a visiting surgeon at the Los Angeles County Hospital, visiting surgeon at the Los Angeles Children's Hospital. I do my private work at the Good Samaritan, St. Vincent's Hospital. I am consulting surgeon for various other free hospitals. I also do work at the Santa Fe Coast Lines Hospital. I do general surgery, which includes all kinds of traumatic things and abdominal and neck surgery.

I am acquainted with the plaintiff, W. W. Scarlett. I have examined him. I saw him about six weeks after the 27th of August, 1931. I took a regular history of his case at that time. At the time I first saw Mr. Scarlett his sickness was limited largely to his left wrist. He had a good deal of swelling about the wrist and hand and the motions of his fingers were considerably limited; that is, he couldn't [fol. 107] bend his fingers as well as he could on the opposite hand. The sensation of his skin was normal. That is, he could feel sharp and dull, and hot and cold. X-ray examination at that time revealed a fracture of one of the small bones in the wrist, technically called the carpal scaphoid, that is the bone which joins onto the lower end of the radius. Because of the conditions of the wrist it was thought advisable to operate on it. This was done on December 4th, 1931. The fractured bones were lined up and

an X-ray was made following that operation and it was found that the bones had slipped out of place again. The second operation was, therefore, done on December 22nd, 1931. It was found impossible to make those bones stay together so two of them were taken out. The first and second bones in the row of small bones nearest the elbow, those were removed.

I examined Scarlett on many occasions subsequent to that time. The last time I examined him was in October, 1932. I found the motions of his shoulder and elbow and the forearm were normal; the dorsal flexion, which is bending the wrist upward, like this, was fifty, over fifty-five degrees. This means he could from a straight line bend the left wrist up making an angle of fifty degrees. He could bend the right wrist up to a straight line or this would make an angle of fifty-five degrees. The palmar flexion was thirty [fol. 108] degrees on the left side and sixty degrees on the right side. That means that the left wrist went down thirty degrees from a straight line, and the right wrist went down sixty degrees from a straight line. The side motion of the wrist, that is, the angle that the fingers move through when you move your fingers, was thirty degrees on the left side and forty degrees on the right side. The motions of his thumb were normal, that is, he could extend the left thumb up as far as the right thumb. The grip of the hands were measured on an instrument which is squeezed by the patient. It registered 15 points on his left hand and 120 points on the right. This measurement, however, is dependent somewhat upon the cooperation of the patient. I thought at that time he was unable to do any kind of manual labor which required heavy use of his left hand. I thought that the range of motion in his wrist and hand was very good and would permit him to do types of light work which didn't require heavy lifting and severe twisting and that sort of thing. I thought, from what I have known of other cases of this sort, that the pain which he was having at that time would improve as time went along, so he would eventually be able to do a good deal of work with this hand. I made a note at that time that I thought that he would certainly recover to that extent where he could work as a passenger [fol. 109] brakeman but that I didn't know whether he could work as a freight brakeman, although I have patients who

had this exact operation who are now working as freight brakemen.

Cross-examination.

By Mr. Hildebrand:

Q. Would you pass Mr. Scarlett for employment if you were an examining physician for the Santa Fe, in the condition that you last saw him for employment as freight brakeman?

A. No, I wouldn't. He is too old. We don't accept men that age.

Q. Aside from his age with the disability of his left hand would you have passed him?

A. Not as a freight brakeman, no sir.

Q. And Doctor, he appeared to be a good, sincere, honest sort of a fellow when you talked to him and examined him, didn't he?

A. He appeared so.

Q. There was no element of bad faith about his conduct with you at all, was there?

A. No.

Recross-examination.

By Mr. Hildebrand:

Q. Well, if he went to you now, he is a discharged employee now, if he went to seek new employment you wouldn't accept him now, would you?

A. We don't accept anybody who doesn't pass a first-[fol. 110] class physical examination. There are many reasons why we couldn't accept him now. He has a blood pressure of one hundred eighty, that would disqualify him for any kind of work with the Santa Fe. We don't accept anybody unless they have a normal blood pressure for any work.

Q. And as a new applicant for employment in the condition of his hand and his hand injury, as you saw it?

A. We wouldn't accept him as a new employee for that. We would accept him on the basis for which he was on the last time I examined him, we would pass him as a passenger brakeman service.

Q. But not as a new employee?

A. No. There are many reasons that I have told you why we couldn't take him as a new employee.

Q. And one of the reasons would be the condition of his hand and wrist.

A. That would be one reason. His blood pressure would be another; his stiff back, the fact that he wears glasses, a number of others which I couldn't answer.

WILLIAM O. PARKS, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

On June 6th we also stopped about 15 minutes at Antioch. [fol. 111] Scarlett was rear brakeman at the time and he assisted in setting out and picking up cars. We stopped at Oakley eight minutes to pick up cars and Mr. Scarlett would stand by the side of his train with his lighted lantern as it went by. At Morman there was twenty *minutes delay in* setting out and picking up cars. On June 8th Scarlett was rear brakeman when on a train that departed from Calwa at 4:25 A. M. He made the switch list. There were five cars in the train of the same type as involved in this case. Three of them went to Richmond. Two were set out at Mormon. On July 12th, Mr. Scarlett was rear brakeman on another train where we had one car of the same type as involved in this accident. On July 14th, Mr. Scarlett was rear brakeman on another train where we had five cars of the same type as that involved in this accident. Scarlett made out the switch list. This train moved from Calwa to Richmond, leaving Calwa at 6:35 A. M. On July 21st, we had another train which had four cars of the same type as involved in this accident. Scarlett was acting as rear brakeman and made the switch list. This train moved from Richmond to Calwa. It was Scarlett's duty to make a check of the cars, hook up the air hose and see that the brakes were set. On July 23rd, Scarlett was rear brakeman on a train which had seven cars of the same type as that involved in [fol. 112] this accident; four of them moved from Calwa to Richmond, one from Calwa to Port Chicago; one from

Calwa to Pittsburg; one from Calwa to Mormon. Scarlett would set out the car at Pittsburg and the one at Port Chicago and would assist in setting out the one at Mormon. It would be necessary for him to set the brake on the cars set out at Pittsburg and Port Chicago. Switch list was made out by Scarlett on these occasions, and on this train it was made out in the daytime. On this train we stopped seven minutes at Merced. Scarlett inspected one side of the train and I the other. This inspection was in accordance with Rule 414, that is in evidence. We stopped at Huston and it would be necessary for the brakeman to walk to the head of the train at that point.

On July 24th, Scarlett was head brakeman on the train that had three cars of the same type as involved in this accident. These cars moved out of Richmond. One was set out at Calwa; two were moved to Empire. It was necessary for Scarlett to assist the conductor when setting out these cars and when set out these cars had to have their brakes set. To set these brakes it was necessary to go up the side ladder of the car.

The Court: Well, but that is what the court desired to know, is whether or not the setting of the brake necessitated the man who sets the brake going up and down the ladder on the car.

A. It does, yes, sir.

[fol. 113] The Court: All right.

Mr. Lockwood: Yes.

Q. And these cars that you have referred to were cars of the same description as the one described here.

A. Yes, sir, both of those Empire cars were.

On July 26th we were moving a train that had four cars of the same description as involved in this accident, and Scarlett was acting as head brakeman. These cars were moving from Calway to Richmond, that is, two were for Richmond and two for Port Chicago. At Port Chicago it was plaintiff's duty to set out those cars and tie them down, that is, set the brakes on the head car. To do this it was necessary to go up the side ladder. On July 27th, 1931, we were moving five cars of the same type as involved in this accident. Scarlett was acting as head brakeman. These

cars were out of Richmond. One was moved to Calway, one to Fresno, one to Riverbank, one to Mormon, and one to Antioch. Scarlett would set out the Antioch car and the Mormon car all by himself. He set the brakes on the one at Antioch and would have to go up the side ladder or end ladder of the car. It is the duty of both conductor and brakeman to inspect the train but when it is necessary to set out or pick up cars on the head end of the train, the head brakeman takes care of that part of the work.

[fol. 114] On July 29th, 1931, two cars of the same type as involved in this accident were moved. Scarlett was acting as head brakeman. These cars moved out of Calwa, one being set out at Mormon and one at Merced. It was necessary for Scarlett to set out the Merced car and it was necessary for the brakes to be set on the Merced car, and in doing this it was necessary to go up and down the side or end ladder. This movement took place in the daytime. On July 30th, 1931, there were seven cars of the same type as involved in this accident, which were moved. Scarlett was the head brakeman. Three of these cars moved out of Richmond to Calwa; one to Merced and one to Mormon. There was also one car picked up of that type at Mormon and moved to Merced. Scarlett would assist in setting the two cars out at Merced. On August 1st, 1931, four cars of the same type as involved in this accident were moved. Scarlett was head brakeman. Two of these cars moved from Calwa to Richmond, one from Calway to Mormon, one from Mormon to Richmond. Scarlett would also either set out or assist in setting out one at Mormon and he would assist in checking up the one at Mormon that was moved to Richmond. We arrived at Mormon and were there thirteen minutes. Whenever cars were set out sufficient hand brakes had to be set on them.

[fol. 115] On August 2nd, 1931, there was one car in the train of the same description as involved in this accident. Scarlett was the head brakeman and it would be his duty to prepare the switch list.

On August 4th, 1931, there were eight cars of the same type as involved in this accident. Scarlett was rear brakeman on that date. It was his duty to make the switch list. We stopped at Madera for a 38-minute delay and it was Scarlett's duty to inspect the cars there, in accordance with Rule 414. We also stopped at Merced 25 minutes and it was

Scarlett's duty to inspect the brakes there. We also stopped at Galt 10 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Holt 8 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Port Chicago 10 minutes and it was Scarlett's duty to inspect the train there. We stopped at Glenn Frazer 11 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414.

On August 5th, 1931, there were three cars of the same class as involved in this accident, and Scarlett was the rear brakeman there. We stopped at Port Chicago 13 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Galt 25 minutes [fol. 116] and it was the duty of Scarlett to inspect the train there in accordance with Rule 414. We stopped at Cressie 32 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Merced 18 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Fresno seven minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414.

On August 7th, 1931, there were seven cars of the same type as involved in this accident, and Mr. Scarlett was rear brakeman on that train. It was his duty to make the switch list. This train stopped at Merced 15 minutes and it was Scarlett's duty to inspect the train there in accordance with Rule 414. At Mormón we stopped twenty minutes and there was an inspection there in accordance with Rule 414. At Orwood we stopped 12 minutes and it was Mr. Scarlett's duty to inspect the train there in accordance with Rule 414. We stopped at Pittsburg seven minutes and it was Scarlett's duty to inspect the train there, in accordance with Rule 414. At Port Chicago we stopped twenty-three minutes and it was plaintiff's duty to inspect the train there in accordance with the same rule.

On August 11th, 1931, there were three cars of the same type as the one involved in this accident, and Mr. Scarlett [fol. 117] was head brakeman. These cars moved out of Richmond, one to Calway, one to Fresno, one to Morman. Scarlett would make the set out at Morman and it was his duty to cut the cars off and make the switch.

On August 14th, 1931, there were three cars of the same type as involved in this accident on the train. Scarlett was the rear brakeman and he made the switch list. We stopped at Maltby 13 minutes and it was Scarlett's duty to inspect the train in accordance with the same rule. We stopped at Port Chicago ten minutes and it was Scarlett's duty to inspect the train there, in accordance with Rule 414. At Antioch we stopped six minutes and it was Scarlett's duty to inspect the train there, in accordance with Rule 414. At Mormon we stopped forty-five minutes and it was Scarlett's duty to inspect the train there, in accordance with the same rule. We stopped at Denair seven minutes and its was Scarlett's duty to inspect the train there, in accordance with the same rule. We stopped at Merced twenty-eight minutes and it was Scarlett's duty to inspect the train in accordance with Rule 414.

(Mr. Hildebrand: Counsel, can't we stipulate that this movement was typical on every one of these trips and that the same sort of things happened on each occasion listed there. Does Your Honor want to listen to all this accumula-
[fol. 118] tive evidence with that offer on my part to stipulate that this is typical?)

There was an eight minute stop at Fresno and plaintiff was under a duty to inspect the train there in accordance with Rule 414.

On August 16th, 1931, another train was moved that had four cars of the same type as involved in this accident. Scarlett was rear brakeman. He made the switch list. We stopped 12 minutes at Merced and it was plaintiff's duty to inspect the cars there. We stopped at Mormon 18 minutes and it was the plaintiff's duty to inspect the train there, in accordance with the same rule. We arrived at Gillis and stopped there twelve minutes and it was Scarlett's duty to make the inspection there in accordance with the same rule. At Antioch we stopped seven minutes and it was Scarlett's duty to inspect the train under Rule 414. We stopped at Port Chicago for seven minutes and it was the plaintiff's duty to inspect the train in accordance with the same rule.

On August 17th, 1931, there were ten cars of the same description as the one involved in this accident. Mr. Scarlett was head brakeman. It was his duty to set out one car at Antioch and assist in setting out the one at Mormon, and

the one at Empire. It was his duty to set the brakes on the one at Antioch.

[fol. 119] COLLOQUY

The Court: Mr. Hildebrand, if we could enter into a stipulation will you include in that stipulation that the plaintiff in this action at times used a ladder similar to the one in question?

Mr. Hildebrand: Well, I don't know, Your Honor, whether I could do that. I could include that he went up and down ladders on some cars there.

The Court: Well, I suppose——

Mr. Hildebrand: Some of them have rear ladders and some of them have side ladders.

The Court: Well, I know that is all true.

Mr. Lockwood: They all have both.

The Court: But if you will include in the stipulation it seems to me we could enter into a stipulation, I suppose, that the defendant is attempting to show that this brakeman has been engaged on so many trains that at least had a certain percentage of these cars and these particular cars were required to be spotted or brakes applied; that the jury would be authorized in concluding that he must have used a similar ladder. Now if you will include that in the stipulation, I think we can stipulate this, may we not, Mr. Lockwood?

Mr. Lockwood: Well, Your Honor, there would have to be a lot in this stipulation because I have got a mass of evidence here as I said a few minutes ago, it is tedious and [fol. 120] tiresome to go through that but it is so vitally important to this case we can't let go unchallenged the statement of the plaintiff, that he never saw a car like this before in the face of this evidence, and even if it is tiresome and take a week.

Mr. Hildebrand: I think under the Safety Appliance Act it is immaterial.

Mr. Lockwood: Well, if Your Honor please—

Mr. Hildebrand: And I will ask for an instruction from the court, in due time for all this evidence, in fact, I will ask for this instruction now; that the jury be instructed by the court that all this evidence under the Federal Safety Appliance Act, as to whether or not this is a safe ladder, is

totally immaterial because that they keep the ladder in a safe condition under that act at their peril.

Mr. Lockwood: To which the defendant replies that there is no question of safety appliance defect in this case, nothing of that sort is in issue in this case.

Mr. Hildebrand: True and so far as one law is concerned the Federal Safety Appliance Act, this evidence may be admissible but as far as the—I mean so far as the Federal Employers' Liability Act is concerned this evidence is admissible but so far as the Federal Safety Appliance Act is concerned, which is another feature of this case, and just as big a feature as the Federal Employers' Liability Act, [fol. 121] this evidence isn't admissible at all and I do think the jury should be instructed as far as one Act is concerned it is admissible and so far as the other Act is inadmissible.

Mr. Lockwood: To which the defendant——

The Court: Well, there are both issues in this case, I don't think we could do that very well unless you abandon your claim under the Employers' Liability Act and depend entirely upon the Appliance Act.

Mr. Lockwood: To which the defendant responds that there is no issue in this case as to any safety appliance defect and we except to any statements made in the presence of this jury in regard to there being a safety appliance defect involved in this case.

The Court: Well, of course, that is an entirely different matter. I thought perhaps that if there might be a stipulation entered into that would serve the purpose.

Mr. Hildebrand: I might do this, if Your Honor please, if Your Honor will take a short recess, I will consider whether or not we want to base this solely on the Safety Appliance Act and that would certainly rule out all this evidence.

The Court: Well, if only the one issue I take it your contention would be this: That under the Safety Appliance Act it is the duty of the Railroad Company to furnish [fol. 122] reasonably secure and safe ladders upon which the men operate and that contributory negligence or assumption of risk hasn't anything to do with a case of that kind. That is, if the jury should find that this was an unsafe ladder, why, there is no defense to it in regard to comparative injury or assumption of risk or contributory negligence.

Mr. Hildebrand: Now, if Your Honor please, in the light of the discussion that was had before the recess we have decided so far as the plaintiff is concerned that he is willing to base his case squarely upon the Safety Appliance Act, section 11, and the provisions of the law relative to the Safety Appliance Act and we withdraw at this time the instructions proposed to Your Honor under section 51 as to another act, the Federal Employers' Liability Act and the obligations which is claimed under that act independently of the Safety Appliance Act to supply a safe place to work. Now does that make the issue clear which was suggested before?

Mr. Lockwood: Let me ask, counsel, are you abandoning your claim for negligence under the Federal Employers' Liability Act?

Mr. Hildebrand: Yes, I am basing the case squarely and flatly under the provisions of the Safety Appliance Act.

Mr. Lockwood: The——

Mr. Hildebrand (continuing): which, of course, eliminates all this evidence as to any claimed or alleged as-
[fol. 123] sumption of risk and with that in mind we would ask the court to instruct the jury on the issue now before the jury to disregard the evidence introduced which might in any way bear on the issue of assumption of risk.

Mr. Lockwood: Without——

The Court (interrupting): Now let's see if we understand each other clearly and definitely: Now, as I understand Mr. Hildebrand he abandons his cause of action under the Employers'—what is commonly known as the Employers' Liability Act?

Mr. Hildebrand: As to negligence.

The Court: What?

Mr. Hildebrand: As to negligence.

The Court: As to negligence; that he rests his case solely upon the Safety Appliance Act and that he expects an instruction from the court to the effect that under the Safety Appliance Act that any ladder used on a train must be reasonably safe and that would be a question for the jury. Now that's the situation, is it?

Mr. Hildebrand: Yes, Your Honor, safe or secure; in the language of the statute it says "secure."

The Court: Well that "secure" means, I suppose, the same thing as a safe ladder to use, doesn't it?

Mr. Hildebrand: It is one of the synonyms for it.

[fol. 124] The Court: Yes.

Mr. Hildebrand: With this understanding, of course, Your Honor: Section 54 of the Federal Employers' Liability Act provides, among other things, that where there is a violation of the Safety Appliance Act contributory negligence is not a defense and I would expect to have advantage of that section of the Federal Employers' Liability Act under the well-known rule that those sections are read together in construing the Safety Appliance Act. I want to make my position clear on that.

The Court: Well, that would simplify the matter; if I should hold that that Safety Appliance Act is only applicable to specific features set out in the act you would have no case.

Mr. Hildebrand: True, Your Honor.

The Court: And that would be a question of law which you could, if you were right and I was wrong, you could avail yourself of in the higher courts.

Mr. Hildebrand: That is true.

The Court: On the other hand, if I hold that that means that ladders must be reasonably safe and what is the safe ladder, the appliance, as it is not definitely set forth in the statute, it is simply a question for the jury to determine whether or not that was a secure ladder and also you have to show sufficient evidence—the jury would have to find that [fol. 125] the fall was occasioned by reason of what you claim to be a defective ladder and if I should take that view of it and I am wrong—at least, take your view, why the defendant would have their remedy by appealing on a purely question of law.

Mr. Hildebrand: That's true, Your Honor.

Exception No. 8

Thereupon the following proceedings were had:

Defendant's Motion for Directed Verdict

Mr. Lockwood: Comes now the defendant, after the plaintiff in the presence of the court and jury has abandoned his action under the Federal Employers' Liability Act, and moves the court to direct a verdict in favor of the

defendant and against the plaintiff at this time and to dismiss the jury because there is no issue now in this case under the Federal Safety Appliance Acts, or any of them, that no issue has been tendered or joined as to any violation of the Federal Safety Appliance Acts, or any of them, and since the abandonment by the plaintiff, in the presence of the court and jury, of his action under the Federal Employers' Liability Act there is now no issue before this court and jury. Now let me say, Your Honor, that if there is to be a discussion of this matter, it being a purely legal matter, it should not be in the presence of the jury. [fol. 126] The Court: The motion to direct a verdict is denied.

To which ruling of the court the defendant then and there duly excepted.

COLLOQUY

Mr. Hildebrand: If Your Honor please, I am not sure that I made our position entirely clear the other day and I want to make sure that our position is clear regarding the proposed waiver of certain claims in this case. In my opening statement, Your Honor will recall that I made as the basis for our case, three distinct plans; one was that it was a violation of section 11, of the U. S. C. A., Title 45, on Railroads, of the Federal Safety Appliance Act, in that it was not a secure ladder or a safe ladder. The second claim of negligence in the case was that it was a violation of the common law duty and that it is the defendant's duty to use reasonable care to supply the employee with a safe place in which to work; and the third claim was that there was a violation of the duty to notify the employee of a change in construction of the equipment. Now my position is this: That we are quite satisfied to waive the claims of negligence on the second and third grounds mentioned, that is to say, we are quite satisfied to waive any claim of negligence in this case so far as the common law duty to provide a safe place to work is concerned, or so far as the duty to notify the employee in this case is concerned, but [fol. 127] I want to make our position clear with reference to the claim that we make, that under the Federal Safety Appliance Act there is a duty to provide a secure or safe

ladder. I want to call the court's attention to the fact that a violation of the Federal Safety Appliance Act is also a violation of the Federal Employers' Liability Act, and I want to make clear our position in that connection. We are not waiving any rights that we have in this case which pertain to this alleged violation of the Federal Safety Appliance Act. For instance, Your Honor will readily see what I am driving at when I call Your Honor's attention to the fact that in Spokane and Inland Railroad Co. v. Campbell, 241 U. S. 497, and San Antonio Railway v. Wagner in the same volume, and the Union Pacific v. Huxoll, in 1245 U. S. 535, the court held, United States Supreme Court, "A violation of one of the Federal Safety Appliance Acts by an interstate carrier is in itself negligence rendering the railway company liable for the resulting injury to an employee under the Federal Employers' Liability Act as being the result of a defect or insufficiency due to its negligence in its cars, engines, or appliances or other equipment within the meaning of the latter act."—that is within the meaning of the Federal Employers' Liability Act, so if I make my point clear it is this: That the only negligence we are claim-[fol. 128] ing under the Federal Employers' Liability Act or in any other regard is a violation of the Federal Safety Appliance Act, section 11, but the reason I am calling Your Honor's attention to this in a rather elaborate fashion is, because of this fact: That the Federal Safety Appliance Act merely says, "It shall be unlawful." It is not in itself a remedial statute. It is true that it has been held that an action lies for the violation of the act irrespective of any other act but ordinarily in these cases and since the enactment of the Federal Employers' Liability Act, the remedial act for enforcement of the liability for the Federal Safety Appliance Act is and has been the Federal Employers' Liability Act, so that, for instance, Your Honor will find each title—after section 11, the section we are relying upon in the United States Code at page 60 under the heading "Notes of Decisions" at the end of section 11—has Your Honor that section under "Notes of Decisions"? Does Your Honor see that heading?

The Court: Yes, yes.

Mr. Hildebrand: As to liability of carrier for injuries to or death of the employee as a result of a violation of this section, "see notes to sections 51 to 59, inclusive of this title" which is the Federal Employers' Liability Act, so

that the Federal Employers' Liability Act is the remedial act as applied to a violation of the Safety Appliance Act. [fol. 129] Now do I make my position clear to Your Honor in this connection?

The Court: Well, yes, you make yourself perfectly clear but I don't know that it is necessary to stress so much the Employers' Liability Act. Of course, it is all a part of the liability act.

Mr. Hildebrand: That's it exactly. Well, here is the point: The statement was made the other day by counsel and I think he misconstrued my position in making the statement, that we waived all claim to any liability under the Federal Employers' Liability Act. We are not making any such waiver. I told Your Honor specifically the other day when we offered to waive these two claims as to negligence, that is to say, the claim that there was not a reasonable care to provide a safe place to work and no notice, I called Your Honor's attention to the fact that these statutes are construed together and we weren't waiving the benefit of these statutes so far as they pertained to a violation of the Safety Appliance Act and insofar as they are read together. Now I don't think it correctly states our position when a statement is made that we waive all rights under the Federal Employers' Liability Act and I want to make our position very clear in that respect but we are willing and we have made the offer to waive any other claim of negligence other than the claim that there was a violation [fol. 130] of section 11 of the United States Code Annotated of the Federal Safety Appliance Act. Now if counsel wants to accept that stipulation we can greatly shorten these proceedings and the issue will then be simply whether it was a violation of the Safety Appliance Act. I think, however, it should be made clear that counsel does accept our offer in that regard.

Mr. Lockwood: May it please the court and counsel: We are not accepting any stipulation. The matter has not been proposed in the shape of a stipulation and we are not accepting it as a stipulation. We are not any parties at all to the statement counsel has made. We are standing upon the issues as framed in this case and we will not be parties to any stipulation on any point that counsel has referred to in addressing Your Honor. That matter is voluntary on the part of counsel and I must emphasize that we are

not accepting any stipulation and do not stipulate and do not consent to in any sense, in any fashion to any change of the issues as framed in this case.

Mr. Hildebrand: Well now, if that is true, I don't believe that this can serve any useful purpose. I was merely trying to shorten these proceedings by making an offer to waive certain claims but——

Mr. Lockwood: Just let me ask, up to just a few words before you closed and gave me an opportunity to reply to [fol. 131] you, counsel, up to that point you had not used the word "offer." I notice that just before you closed that you used the word "offer." That is the first time that I have heard you use it. I have understood all the time since you made your remarks Friday afternoon and just before I made my motion that you were waiving all claims for negligence under the Federal Employers' Liability Act. Now for the time you mention an offer. If your offer is named with the idea of receiving an acceptance or acquiescence from the defendant, we will have to refuse it and we cannot accept it in any shape, form or manner.

Mr. Hildebrand: Now, if Your Honor please, I think it was apparent the other day that I made this offer and said we would make this waiver with the idea of trying to shorten these proceedings. Perhaps we did not achieve very much by the attempt, but the pleadings in this case unquestionably raise certain issues. I am sure those issues are the two issues that I offered to waive, that I said we would waive. However, it is like an automobile case—suppose in an automobile case the pleadings raise certain issues. The defendant denies negligence in the pleadings and at the day of trial the defendant comes in and admits liability. It has recently been held that the plaintiff has the right to go ahead and prove his case under the pleadings. [fol. 132] Similarly here, under these pleadings I am inclined to think that to meet the issue of whether or not the common law duty to provide a safe place to work was complied with and to try to eliminate that issue certain evidence that counsel is offering may be admissible. Now I say we will waive that and we won't need that evidence. All that the evidence could do would be to eliminate that one issue. It wouldn't affect the Safety Appliance Act at all to waive them and eliminate that one issue. I am willing to waive them by stipulation. On the other hand if they insist on going ahead with it and want to eliminate it with-

out accepting my stipulation I suppose that under the pleadings they have a right to do that. I am merely making the proposal and only make the proposal with the idea of shortening these proceedings. If they don't want to waive my proposal then I suppose that the proposal has been in vain. I don't believe that under the pleadings in the case and under the issues as framed that we can force them to accept that stipulation or that offer.

The Court: Well, I don't know that they are required to accept your offer. I understood that you abandoned all causes of action you had with the exception of the safety features of the act.

Mr. Hildebrand: As applied and construed with the other federal statutes.

[fol. 133] The Court: Well, I can't quite follow that. You don't have to—the pleadings could have eliminated anything about the safe place to work.

Mr. Hildebrand: Well, that's what we are willing to eliminate by stipulation.

The Court: But I don't think you need to—any stipulation in regard to that, do you? If your pleading is broad enough to include the safety appliance features I think you can simply say, which you have already said, that you abandon all claims excepting that in regard to the Safety Appliance Act.

Mr. Hildebrand: Well, I think I stated specifically the other day, Your Honor, and I don't want any misunderstanding about it, for instance, I stated the other day——

The Court: I remember what you stated. You stated that you abandoned all claims excepting under the Safety Appliance Act.

Mr. Hildebrand: Well then——

The Court: But that as far as the employers' liability was concerned that the only features in regard to that were that you didn't have—that knowledge wouldn't make any difference.

Mr. Hildebrand: And also contributory negligence.

The Court: And contributory negligence.

Mr. Hildebrand: And the other points where the two statutes are construed together, I did make that qualifica-

[fol. 134] tion the other day and that is what I want to make clear now, I don't want counsel to come in and say I am abandoning any rights that we may have under these federal statutes.

The Court: Well, you covered that all the other day when you said you abandoned all claims for negligence other than the Safety Appliance Act. Now I suppose that the Safety Appliance Act is after all, negligence is involved.

Mr. Hildebrand: That's the point.

The Court: No question about that. My judgment is that the matter is perfectly clear to the court but the responsibility is yours.

Mr. Hildebrand: Yes. Well, I am not backing down one bit on that point that we—I think, were mutually agreed upon. I do want to make my position perfectly clear, however, Counsel says "Why, you waived all claims under the Federal Employers' Liability Act," which is not exactly correct. It is all claims except insofar as the Safety Appliance Act is concerned. That is the only qualification.

The Court: That is all clear to the court.

Mr. Hildebrand: Yes. Now I don't know unless that offer is accepted whether it makes much difference in the method of proof.

The Court: Well, I don't think there has to be any offer accepted. I think you can abandon any cause of action you have got and the other side have got nothing to do with that. [fol. 135] Mr. Hildebrand: Very well. I really wanted to make my position clear.

The Court: All right, proceed.

Mr. Lockwood: To make the defendant's position clear, at the close of these remarks I again state that we are not accepting any stipulation where we were no parties to at all in any sense. Those remarks of counsel we have nothing to do with them and we are not asking for it and we are not accepting any kind of a stipulation. It hasn't been proposed in the form of a stipulation. As the court well said, counsel of his own free will announced in open court that they abandoned their claim for negligence under the Federal Liability Act and were resting their case upon the Safety Appliance Act. To be specific, counsel on September 22nd said, "If Your Honor please, in the light of the discussion that was had before the recess we have decided, so far as the plaintiff is concerned, that he is willing to base his case squarely upon the Safety Appliance Act, section 11, and the provisions of the law relative to the Safety Appliance Act and we withdraw at this time the instruc-

tions proposed to Your Honor under section 52 as to another act, the Federal Employers' Liability Act and the obligations which is claimed under the act independently of the Safety Appliance Act, to supply a safe place to work.". To which I asked counsel, "Are you abandoning [fol. 136] your claim for negligence under the Federal Employers' Liability Act"? To which counsel responded, "Yes, I am basing the case squarely and flatly under the provisions of the Safety Appliance Act which, of course, eliminates all this evidence as to any claimed or alleged assumption of risk, and with that in mind I would like to ask the court to instruct the jury on the issues now before the jury to disregard the evidence introduced which might in any way bear on the issue of assumption of risk." That isn't all that counsel said but that is the gist and then to which the court interrogated the counsel as to whether you understood each other and counsel repeated to the court in substance of what I have stated.

Mr. Hildebrand: And would you read that one little section there where I refer to these other sections?

Mr. Lockwood: Yes. The court then addressed counsel saying, "Now, let's see, do we understand each other clearly and definitely: Now as I understand Mr. Hildebrand he abandons his cause of action under the employers—what is commonly known as the Employers' Liability Act." Mr. Hildebrand said, "As to negligence." The court said, "What?" Mr. Hildebrand responded "As to negligence" and the court said, "As to negligence; that he rests his case solely upon the Safety Appliance Act and that he expects [fol. 137] an instruction from the court to the effect that under the Safety Appliance Act that a ladder used on a train must be reasonably safe and that would be a question for the jury. Now is that the situation?" To which Mr. Hildebrand responded, "Yes, Your Honor, safe or secure; in the language of the statute it says 'secure' ". The court then said, "Well, that 'secure' means, I suppose, the same thing as a safe ladder to use." Mr. Hildebrand said, "It is one of the synonyms for it." The court said, "Yes" and Mr. Hildebrand responded, "With this understanding, of course, Your Honor: Section 54 of the Federal Employers' Liability Act provides, among other things, that where there is a violation of the Safety Appliance Act contributory negligence is not a defense and I would expect to have

advantage of that section of the Federal Employers' Liability Act under the well known rule that those sections are read together in construing the Safety Appliance Act. I want to make my position clear on that."

Mr. Hildebrand: That is all I intended to amplify, this morning.

Mr. Lockwood (reading): The court then said, "Well, that would simplify the matter; if I should hold that the Safety Appliance Act is only applicable to specific features set out in the act, you would have no case?" Mr. Hildebrand said, "True, Your Honor." The court then said, [fol. 138] "That would be a question of law which you could, if you were right and I was wrong, you could avail yourself of in the higher courts." Mr. Hildebrand: "That is true." That is the substance of the remarks. That isn't quite all that was said and that is the substance of the remarks.

The Court: Well, I recall the remarks entirely. As I understood at the time that Mr. Hildebrand didn't appear to be very sure in regard to whether bringing an action of this kind, at least the Safety Appliance Act, whether or not that was a part of the Federal Liability Act—Employers' Liability Act and Mr. Hildebrand reserved that; that if it is necessary to bring in the Employers' Liability Act to prosecute this particular section for violation of the Safety Appliance Act that that portion of the Employers' Liability Act was not abandoned.

Mr. Hildebrand: That's the only point.

The Court: Well, I say, that is perfectly clear to the court.

Mr. Hildebrand: I thought it was but I wasn't sure I had the record straight on it.

The Court: Well, that is all clear to the court. Proceed, gentlemen.

[fol. 139] WILLIAM O. PARKS, a witness for the defendant, being first duly sworn, testified further on

Direct examination.

By Mr. Lockwood:

Miss Raffetto, will you kindly refer to where we left off in Mr. Parks' testimony? (Reporter refers to testimony and reads said testimony to counsel.)

Exception No. 8-a

Thereupon the following proceedings were had:

Mr. Lockwood:

Q. I will hand you back these books and delay reports that you had the other day. On this date of August 17, 1931, when Mr. Scarlett was the head brakeman were there any more cars set out than you have testified to?

Mr. Hildebrand: Well now, if Your Honor please, I take it that under the waiver that we gave that this testimony would all be immaterial. If counsel is going to insist upon presenting it I haven't any very serious objection to it except that it seems to me it wastes time under the waiver and proposal that I made.

The Court: Well, you make the formal objection. That is hardly an objection that you are urging here.

[fol. 140] Mr. Hildebrand: Well, I am not. I don't think the evidence means much one way or the other.

Mr. Lockwood: Just a moment, Your Honor. I object to these remarks of counsel and ask that it be stricken from the record and ask that the jury be admonished to disregard them. For him to state that in the presence of the jury that the evidence I am offering here is immaterial, incompetent, irrelevant and immaterial, and I object to that statement before the jury. I am not making that comment on his evidence until the proper time and I resent that statement.

The Court: Well, I think Mr. Hildebrand should have added to his remark "that it is not material to the issue that he is relying upon."

Mr. Hildebrand: That is the point, Your Honor, and I object to the evidence upon that ground.

The Court: The objection is sustained.

To which ruling of the court the defendant then and there duly excepted.

Exception No. 9

Thereupon the following proceedings were had:

Q. State whether or not on this trip of August 17, 1931, the plaintiff, Scarlett, set out and set the brakes on any or all of the cars that were hauled.

[fol. 141] Mr. Hildebrand: Objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Q. On August——

Mr. Lockwood: Your Honor please, I am only interested in making the record on this matter. If the court is going to rule and will make a like ruling to other evidence I want to make it very clear to Your Honor.

The Court: Well, now, can it not be stipulated, gentlemen, that you have quite a mass of evidence of a similar kind, that is, evidence that would tend to show that Mr. Scarlett must have observed the conditions that existed there by reason of his being around that ladder so much and using the ladder and using certain parts of the train which gave an opportunity of observing this ladder. Now that, I suppose, is what—in substance what you are endeavoring to show?

Mr. Lockwood: Yes, Your Honor.

The Court: That is, that he assumed the risk because it was obvious, he could see it?

Mr. Lockwood: Yes, Your Honor.

The Court: And you want to show that. Counsel for the plaintiff objects on the ground that that is not an issue in the case at all and the court is of the opinion that it is not an issue and the objection is sustained and the objection will be sustained to any additional evidence along that same line and that will save constant repetition.

[fol. 142] Mr. Lockwood: I might say, however, Your Honor, that in addition to showing knowledge I am offering this evidence for the further purpose of answering and repudiating any claim that this side ladder or the grab irons on it were not secure or safe because I claim that his constant use of this same equipment for a period of four months under this conductor and other conductors, which I will mention, without an accident to himself before is very strong evidence and proof that the side ladder and hand or grab iron was secure and safe so I am not confining this evidence that I am offering and that I have been offering from the witness Parks merely and solely to show knowledge but also to show that it is a safe and secure grab iron and side ladder.

Mr. Hildebrand: Well, I don't believe that that would be competent evidence. A man might use any kind of equip-

ment that might be unsafe and avoid injury for a certain period of time but that wouldn't be competent evidence to prove whether or not it was safe.

The Court: Well, that's something the jury might take into consideration in determining whether it was safe or not but I can't quite see how Mr. Scarlett's connection with it would make it safe or unsafe, either one or the other. I suppose you have a right to show the number of cars [fol. 143] equipped in this fashion and that there has or has not been any accidents and that might or might not be a fact that the jury could take into consideration in determining whether or not that was a reasonably secure ladder.

Mr. Lockwood: Does the court desire to make any change in its ruling since my statement to the court?

The Court: Now, of course, it all—I will admit that that line of testimony would show that brakemen in general had occasion to observe this ladder and its construction very frequently every time they are at the end of a car or went up the side of a car and the jury might take that into consideration in determining whether or not it was a reasonably safe appliance. Now if it was a hidden matter where it is not come in contact very frequently it would be a little different matter but so far as this testimony goes to show that the
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process of doing it and if he doesn't like to hear that evidence——

Mr. Hildebrand: I think I said he never noticed equipment of this kind before. There isn't any question in my mind that he saw cars of this kind, whether he saw or appreciated this equipment is an issue and I think I have attempted to show that issue before but I have abandoned that issue.

The Court: Well, you urge your objection to this line of testimony?

Mr. Hildebrand: Yes, Your Honor.

The Court: The objection sustained.

To which ruling of the court the defendant then and there duly excepted.

[fol. 145] Exception No. 10

Thereupon the following proceedings were had:

Mr. Lockwood: The defendant at this time offers to prove by this witness that on August 19, 1931; August 20, 1931; August 22, 1931; August 25, 1931 and August 26, 1931, that the plaintiff Scarlett was either a head brakeman or a rear brakeman on the freight train under Conductor

Appliance Act, (reading) "Any employee of any common carrier engaged in Interstate Commerce by railroad who may be injured by any locomotive, car or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge," and we urge the objection that all this testimony offered is incompetent, irrelevant and immaterial so far as the Safety Appliance Act or the issues of this case are concerned.

Mr. Lockwood: And we are offering it further as proof that this—the side ladder and grab irons on these cars were safe and secure.

Mr. Hildebrand: To that we object as incompetent, irrelevant and immaterial and not proper evidence and covered elsewhere and merely accumulative to other evidence that has been offered as to how many accidents there has been.

Mr. Lockwood: And not only it is proof offered to show it was safe for Scarlett, safe for others.

[fol. 147] The Court: Can't we do that by stipulating and

Mr. Lockwood: Well, the defendant can't be a party to a stipulation. We are making the offer in the regular fashion and, of course, we are entitled to a ruling on the offer of the evidence.

[fol. 148] The Court: Well, the objection is sustained.

Mr. Carlson: Your Honor, if I can interrupt just a moment. I have a case in the other department, may I be excused?

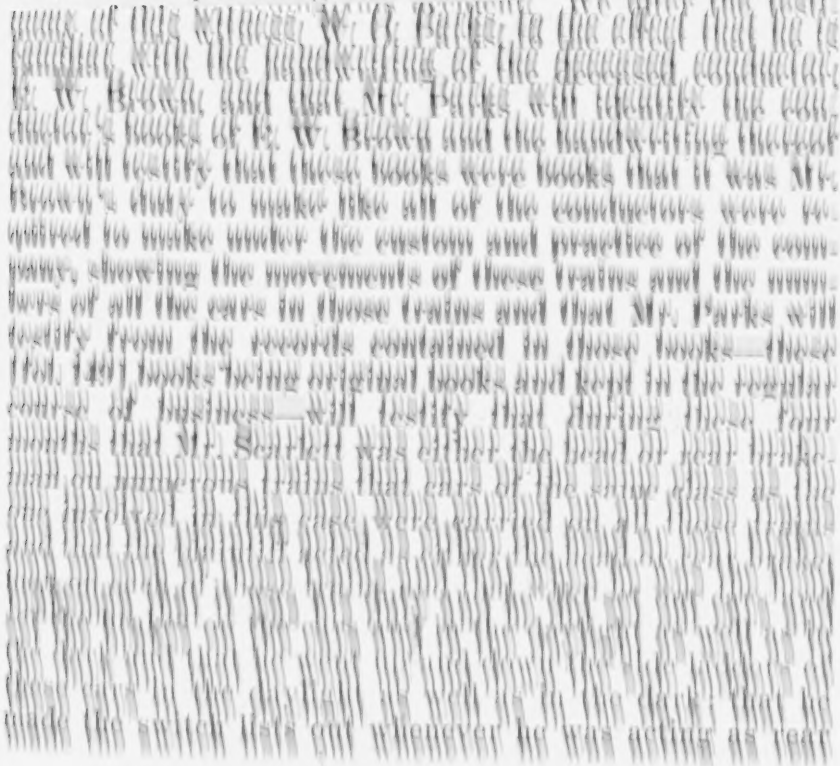
The Court: Yes.

To which ruling of the court the defendant then and there duly excepted.

Exception No. 11

Thereupon the following proceedings were had:

Mr. Lockwood: The defendant further offers to prove that E. W. Brown, now deceased, was a conductor on freight trains and that under him was working the plaintiff during the months of May, June, July and August, 1931, during the four months preceding this accident. We offer the testi-



brakesman and that when he was rear brakeman that the trains stopped at numerous stations and inspections were made by the plaintiff in accordance with the rule 414, both in the daylight and the dark, concerning these cars, and we offer to put in evidence these books of E. W. Brown, deceased, and the delay reports of E. W. Brown, deceased, showing these facts and will establish all of this through the testimony of this witness, W. O. Parks.

The Court: Now as I understand it, you wish to show that while Mr. Brown was conductor, acting as conductor, that Mr. Scarlett did practically the same things concerning the operation of this train as he did when Mr. Parks was conductor?

[fol. 150] Mr. Lockwood: Yes, exactly.

Mr. Hildebrand: We will stipulate to that.

The Court: You will stipulate to that, all right. It is stipulated that while Mr. Brown was conductor that Mr. Scarlett had the same experience and acted in the same way concerning the operation of the train as he did while Mr. Parks was conductor.

Mr. Lockwood: The defendant states to the court that the defendant cannot be a party to such stipulation. We are merely making that offer in the usual fashion and we cannot be a party to the stipulation. We are offering to prove that evidence.

The Court: Well, if you can show the court whereby in any way that you would be prejudiced but I think that where the other side will stipulate to what you want to prove that the court has always got a right to say, "Well, that is stipulated to" instead of taking the time.

Mr. Lockwood: Well, for the reasons I have stated to the court we can't stipulate to it. We are merely making the offer to prove it.

The Court: Well, what do you want to do, Mr. Hildebrand?

Mr. Hildebrand: Well, I will object to it as immaterial. We are willing to stipulate to it as a fact but we object to its materiality.

The Court: Well, the objection is sustained.

To which ruling of the court the defendant then and there duly excepted.

[fol. 151] Exception No. 12

Thereupon the following proceedings were had:

Mr. Lockwood:

Q. Now, Mr. Parks, will these following named gentlemen please arise? J. C. Fanning, R. S. Edmonds and E. D. Hubbard. (Three gentlemen stand in court room as the foregoing names are called.) Will the clerk please swear them?

The Court: What?

Mr. Lockwood: I would like to have them sworn as witnesses.

The Clerk: I didn't get their names. Will you give it to me again?

Mr. Lockwood: J. C. Fanning, R. S. Edmonds and E. D. Hubbard.

The Clerk: Each of you gentlemen raise up your right hand. (The foregoing named persons sworn as witnesses in this action by the clerk of the court.)

Mr. Lockwood: The defendant offers to prove——

The Court (interrupting): Sit down, gentlemen.

Mr. Lockwood: The defendant offers to prove by these witnesses, Hubbard, Edmonds and Fanning, that during the months of May, June, July and August of 1931 that each of them were conductors on freight trains for the defendant and that under each of them the plaintiff Scarlett was act-[fol. 152] ing as either head or rear brakeman on the trains and that these freight trains—strike that—and that each of these conductors had in their trains on numerous runs during these four months and on nearly every day thereof cars of the same description as used—as involved in this case and that whenever the plaintiff was head brakeman, as he frequently was, during these four months he set out the cars of this same description at different stations, he went up and down the side ladders similar to the one involved here, set the brakes on the cars. He did this repeatedly in the daytime and at night and that in the instances where the plaintiff was rear brakeman, as he was in many instances on these trains under each of the conductors, the plaintiff made out the switch lists and that when the train stopped at numerous stations, as it did en route, that it was the plaintiff's duty and he did make an inspection of these

trains under rule 414 and that during these four months the plaintiff in addition to being—working under Conductor W. O. Parks was working under these four named conductors and doing this work.

Mr. Hildebrand: We are willing, for the purposes of this case, to stipulate to that.

Mr. Lockwood: We are offering that evidence, Your Honor, offering to introduce evidence from the witnesses just sworn.

[fol. 153] The Court: Well, the stipulation being refused——

Mr. Hildebrand: On the offer we object to the evidence as immaterial.

The Court: The objection is sustained.

To which ruling of the court the defendant then and there duly excepted.

(The witness, W. O. Parks, continuing on direct examination):

I am familiar with the side ladders and grab irons on the class of cars involved in this accident. In my opinion these side ladders and grab irons on these cars are secure and in my opinion the side ladders and grab irons are safe for men to use; and it is my opinion that the anchor rod or side rod on these cars that passes under the ladder and between the ladder and the side of the car is calculated to not interfere with the free use of the ladder by the brakeman in any way.

Exception No. 13

Thereupon the following proceedings were had:

The Court: I understand, ladies and gentlemen of the jury, that one of the issues in this case as to whether or not that ladder was a secure and a secure ladder means, one that is reasonably safe for those who have to have occasion to use it. Proceed, gentlemen.

Q. Now——

[fol. 154] The Court: And that the court doesn't express any opinion or views of any kind as to whether or not the ladder was secure or unsecure. That is a matter that will have to be determined by you and you must not draw any inferences one way or the other from any remarks made by

the court or the rulings of the court as to whether or not that ladder was a secure ladder or not. That is something that you have got to determine from the evidence in the case, from nothing else. Proceed.

To which ruling of the court the defendant then and there duly excepted.

Cross-examination.

By Mr. Hildebrand:

Exception No. 14

Thereupon the following proceedings were had:

The Court: Now, Mr. Parks, Mr. Lockwood asked you whether or not in your opinion as a trainman whether or not that was a secure ladder and now what did you mean by that, Mr. Parks, because—I am asking you that because lawyers and courts have somewhat—have different meanings for that. Now under the law applicable to this case, a secure ladder means one that's reasonably safe to be used by those trainmen who have occasion at all times to use [fol. 155] it. It doesn't mean that it has got to be securely screwed or bolted to the car. "Securely" means reasonably safe for use by those who have occasion to use it. Is that what you meant?

A. Yes.

To which ruling of the court the defendant then and there duly excepted.

Exception No. 15

Thereupon the following proceedings were had:

Mr. Hildebrand: Have you observed as to whether any considerable number of these cars have the brace rods worn shiny right back of where the rod crosses the rung of the ladder?

The Court: You said they are worn shiny?

Mr. Hildebrand: Yes.

Mr. Lockwood: Objected to as immaterial, irrelevant and incompetent whether they are worn shiny or not.

The Court: The objection overruled.

A. Well, I couldn't say. Some of them are in that condition but I haven't made any examination to find out.

To which ruling of the court the defendant then and there duly excepted.

Redirect examination.

By Mr. Lockwood:

Q. Take other classes of cars besides the class of car in [fol. 156] question, any other classes of cars in common use on the railroad in 1931; state whether or not it is a fact that there are toe marks on different parts of the equipment, sometimes on the boards, side of the car, and sometimes on bolt heads and nut heads that may protrude out from the car and underneath the ladder, is that true?

A. I have observed that condition, yes, sir.

Q. And isn't it a fact, Mr. Parks, that on practically every freight car that has been in use for any considerable number of years that you examined under the side ladder and you will find somewhere there the marks of feet of the men on different parts of the equipment, sometimes on the boards and sometimes on the bolt heads and nuts?

A. Yes, sir.

Q. So that any shinyness that you may have ever observed on this rod or any rod is not peculiar to this type of car then, is it?

A. No, sir.

J. C. Fanning, called as a witnes on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am a conductor for the Santa Fe and have been since 1925. Previous to that time and since 1911 I have been a brakeman in the service of the Santa Fe. I am familiar with the type of equipment such as is involved in this case. [fol. 157] That is, the class of cars that plaintiff was on at the time he received his injury. I am familiar with the side ladder anchor rod that extends diagonally from the end of

the car down under the ladder. It is my opinion that the side ladders and hand holds on this class of cars are secure. It is also my opinion that the side ladder and hand holds on this class of cars are safe.

WILLIAM O. PARKS, a witness for defendant, recalled and testified as follows:

Recross-examination.

Mr. Hildebrand:

Exception No. 16

Thereupon the following proceedings were had:

Mr. Hildebrand:

Q. Mr. Parks, some time after the accident did you have a telephone conversation with the plaintiff in this case, Mr. Scarlett?

Mr. Lockwood: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination. No such subject was ever gone into on direct examination.

Mr. Hildebrand: Well, I think it was by inference as to his opinion.

The Court: The objection overruled.

A. Yes, I have talked with him on different occasions.

[fol. 158] Q. And during one of those telephone conversations did you state to Mr. Scarlett that you nearly fell off one of this same class of cars after you were hurt—after he was hurt, due to your foot having struck this rod?

Mr. Lockwood: Objected to as not proper cross-examination, as immaterial, irrelevant and incompetent and even if such a statement had been made it would not be binding upon this defendant, neither would it be proof of any negligence nor proof of any failure to have a secure side ladder and grab iron.

The Court: Objection overruled.

A. I have no knowledge of slipping on a rod of that kind or did I tell him.

Q. You didn't say that?
A. No, sir.

To which ruling of the court the defendant then and there duly excepted.

J. R. ANDERSON, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live at Fresno. I am claim adjuster for the Santa Fe Railroad and have been such for ten years. My duties are to investigate all accidents and handle settlements of claims. I am acquainted with W. W. Scarlett, the plaintiff. I saw him at his home in Richmond on or about De- [fol. 159] cember 2, 1931. Conductor Parks was there with me. Defendant's Exhibit No. 1 was prepared and signed there by Mr. Scarlett at that interview. I called at the house of Mr. Parks to—of Mr. Scarlett to, in my duties investigating the accident and told him that I wished to obtain all the facts so as to make a report to the company of just how it all happened, and he stated that he was riding the cut of fifteen cars down the main line to a coupling on the main part of thetrain and that he walked over the top of the cars and got to this end car that was involved in the accident. He said that he was coming down the side ladder and when he was about one-third of the way down he fell. He stated that he did not know the reason for his falling but as far as he knew that it was just a plain accident. That, I think, covers it in substance.

Q. In that conversation, state whether or not Mr. Scarlett said to you anything about his foot coming in contact with some rod behind or near the side ladder.

A. He did not.

Q. Did he mention any rod on any other part of the equipment on the car that—and said that he thought it had something to do with his fall?

A. He did not. He—on the contrary he stated that he thought that every part of the ladder and car was in first class condition.

The body of the statement is in my handwriting and was [fol. 160] written in the presence of Mr. Scarlett. I would ask him a question or two as to how the accident happened and he would give me an answer and I would write it down on the paper, and then I would ask him another question. I put it down in narrative form. After it was written I presented it to Mr. Scarlett to read. He read the entire statement in my presence. Then on the last page Mr. Scarlett wrote the words, "I have read the three sheets and find them correct." On the bottom of the other pages Mr. Scarlett put down his initials, "W. W. S." There were no changes made in this statement at any time after Mr. Scarlett signed it. There were no threats or promises made to Mr. Scarlett and no coercion used to obtain this statement. He appeared to be in his right mind; was alert and seemed to have the free use of his senses as far as I could observe. He made the statement freely.

O. F. Gray, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live in Los Angeles. I am claim adjuster for the Santa Fe Railway. My work is confined to the office in Los Angeles. I have been claim adjuster for about seven years. I talked with W. W. Scarlett, the plaintiff, on or about [fol. 161] March 14, 1932, in my office in Los Angeles. The girl that was in the outer office came in there and said Mr. Scarlett was outside and wants to talk to somebody about his case. I was the only one around there. I said, "All right, let him come in here." He came in. I said, "Hello, Mr. Scarlett, how are you?" "Oh, not so good," he said; "not getting along so well." I said, "Well, I suppose you want to talk to somebody about this case. I don't know much about it. The only thing I know is no liability." He said, "Well, I found out something here." I said, "What's that?" He said, "Well, some time ago I didn't know what caused the accident but I know now that my foot slipped on a rod on the ladder." I said, "Well, that's new dope.

[illegible] better put that down here, write up a statement." So I wrote up a statement and drew a little picture there showing where this rod was because I didn't know anything about it and he went on to say [illegible] and I looked at that and it looked pretty good [illegible] is that correct?" He said "Well, that's what caused it. It is reasonable." I said "Well, we will put it down here on paper and put it in the file and [illegible] and I put it on paper and drew a little diagram there where this rod was and it gave to him. I said "Read that over," and he read it and I said "Is that it?" He said "Yes, that is the way it happened." I said "All right, write on there 'I have read the above statement of so many sheets, it is true and correct' and then sign your name." And he did it.

Q. Well, now, in writing this statement out you wrote it in your own handwriting I assume?

A. Yes.

Q. Now, did you attempt to put down the substance of what he told you about that?

A. That's right, just a narrative form, just the statement he gave.

Q. And in the statement I notice [illegible] the statement [illegible] that was made at that time?

A. [illegible]

Q. And did he sign it there in your presence?

A. Yes, sir.

Q. And did he initial those first two pages of it?

A. Yes, sir.

Q. Now, have you given the substance of the conversation there?

A. Well, that's about all that took place and I just wrote it up in narrative form, what he said and I said, "That might help this thing along a little bit and I will let you know. Mr. Anderson is handling the case, and see you later," or something to that effect.

Q. Were any threats or promises used to get him to sign that?

A. Oh, no.

[fol. 163] Q. And had you previously read his first statement which was marked "Defendant's Exhibit No. 1"?

A. Yes, sir.

Q. And you knew what was in that, did you?

A. Yes, sir.

Q. And you had him write the second one because he was giving you some information now that you knew wasn't in the first one?

A. That's right.

Recess No. 11

Thereupon the following proceedings were had:

Mr. Hildebrand:

Q. Did you learn that his own conductor the next day inspected this brave vote?

Mr. Lockwood: Objected to as not proper cross-examination, incompetent, immaterial and irrelevant.

The Court: Objection overruled.

A. He did not say anything about the conductor inspecting it, Fanning, that is another conductor, not his conductor.

Q. Did he tell you that this same Conductor Fanning, by the way, Conductor Fanning came back to the witness stand and testified that he had been told by Mr. Hildebrand who went to his car that he was to look out for Mr. Lockwood's vote?

[fol. 164] Mr. Lockwood: That is objected to as incompetent, irrelevant, and immaterial, not proper cross-examination.

Mr. Hildebrand: It is in the statement.

Mr. Lockwood: The statement itself is the best evidence. He told you he put down there the substance of what was said.

Q. Well, did he tell you that?

The Court: Well, the objection overruled, but, ladies and gentlemen of the jury, you will keep in mind that that is not evidence in this case. Simply because it is in that statement, that there ever was such a telephone conversa-

tion between Mr. Parks and the plaintiff in this action. No one has testified to that fact. That is hearsay. That is statement made at other times and is not evidence in this case. Proceed.

Q. Did he tell you that?
A. Yes, he did tell me that.
Q. He told you that?
A. Yes.

At which course of the court the defendant then and there duly excepted.

WILLIAM O. PARKS, recalled as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live at Fresno. I am superintendent for the Santa Fe Railway on the Valley Division. Have been since May, 1921, resident for nearly seven years. Previously I was trainmaster, first duty for the superintendent and then the mechanical department. I have been with the Santa Fe for forty-four and a half years. I am familiar with the different customs and practices of the Santa Fe.

Q. I will ask you whether or not it is customary, in the operation and practice with the Santa Fe, for the Company to issue bulletins of any kind notifying the men of any change in equipment that would affect their safety in any way.

A. It is not customary.

It is the custom of the Santa Fe Railway to put out periodically employees' time-tables. There was one issued for the Valley and San Francisco Terminal Divisions in May, June, July and August of 1921. These trains that I

have testified to were operated on the Valley Division. The instrument marked "Defendant's Exhibit No. 4" is the instrument that was in effect on the Valley Division on July 4th, 1916, and is now in effect on the Valley Division in that same territory. It is entitled "Rules governing conductor and trainman in charge of freight trains." There are three pages to those rules. Defendant's Exhibit No. 4 is offered and received in evidence.

Mr. Lockwood: And the next instrument that we will offer is with regard to the safety rules from the back of that time card. (Reading from exhibit.) "Safety Rules. Every employe should report promptly to his foreman, some member of the Safety Committee or other proper person, all unsafe conditions or practices."

Jones Horn called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination

By Mr. Lockwood:

I live in Portland. I am General Car Inspector for the Southern Pacific Company, Pacific Lines. I have been in the employ of the Southern Pacific Company for 30 years. I have been in the employ of the Southern Pacific Company in the capacity of car inspector for 20 years. I was car inspector for the Southern Pacific and had held that position since 1916. I have examined "Defendant's Exhibit No. 4" and also "Plaintiff's Exhibit No. 4" and I am familiar with the type of freight car shown in these exhibits. I have had an opportunity to observe the use of that type of freight car. I am also fa- [fol. 167] miliar with the brace rod underneath the side ladder and between the side ladder and the side of the car.

Q. Now basing your answer, Mr. Holt, upon your experience as testified to here, tell the court and jury whether in your opinion the side ladder on this type of equipment and holds thereon constitute a secure ladder and handles.

A. They meet the requirements as secure and safe handles and ladders.

Q. And state in your opinion whether or not the side ladders on this type of equipment are safe equipment.

A. It is safe, safety appliance.

Q. And state whether or not, in your opinion, whether or not that brace rod or side rod underneath that ladder is in any way calculated to interfere with the free use of the ladder by the brakeman.

A. It does not interfere with the safety of the ladder.

Q. But does it in any way interfere with free and safe use of the ladder?

A. No, sir.

Q. Now, Mr. Holt, it is generally known, a matter of common knowledge that freight cars of different roads are used on different roads; in other words, a Southern Pacific train may have in it Santa Fe cars and Northern Pacific cars and Rock Island cars, it may have a dozen or twenty cars from foreign roads, as you say; that is true, is it not?

A. Yes, sir.

[fol. 168] Q. In other words, cars from one road to another are interchanged continually by the different roads, are they not?

A. Yes, sir.

Q. All right. Now are you familiar with the Interstate Commerce Commission rules and regulations with reference to the exchange of cars?

A. Yes, sir.

Q. And state whether or not the Southern Pacific Railroad is—can use on its railroad any cars of the Santa Fe Railroad or any other railroad unless the equipment is in accordance with the Interstate Commerce Commission standard.

A. Cars will not be accepted in interchange unless they meet the requirements of the safety appliances; the Santa Fe cars and this car in particular meets these requirements and are accepted every day in interchange with the Southern Pacific as well as other railroads.

Cross-examination.

By Mr. Hildebrand:

Exception No. 18

Thereupon the following proceedings were had:

Q. Well, let me ask you if you have ever read the title 45 on Railroads of the United States Code Annotated.

A. There is a certain provision. I don't know that I have read this particular book.

[fol. 169] Q. You made a study of the law on this question?

Mr. Lockwood: Why not point out some specific provision? If you don't I will. And we will ask then about those; you will find he knows more about that than you do.

Mr. Hildebrand: Oh, I don't think so. I have been handling these cases for years and I have studied them for years and he hasn't.

A. If you want to give me a little time I can locate myself in this book and I might tell you yes or no.

Q. Have you read it? Have you ever read it before?

Mr. Lockwood: Just a moment, only one question at a time. He will answer your question.

Mr. Hildebrand: That is just what I have asked him, if he has ever read that book before, if he is familiar with it.

Q. Do you know how many of those——

Mr. Lockwood (interrupting): Just a moment. Just one question at a time and he will read it. You have given him a big law book here. He can handle himself but not with you talking all the time.

Mr. Hildebrand: I don't see why he can't answer a simple question whether he has ever read it.

A. I have read a number of books in my time, sir.

[fol. 170] Q. Well, have you read that one?

A. Just give me a chance and I will locate some paragraph there that is located with the car work.

Q. Well, have you read it?

A. Well, if you know where it is—excuse me, Your Honor.

Mr. Lockwood: I might say, Your Honor, in my judgment the question calls for something that is incompetent, irrelevant and immaterial.

Mr. Hildebrand: Well, he poses as a legal expert on these matters.

Mr. Lockwood: Pardon me now, counsel, let's have a little time to get in our objection. I might say this is really incompetent, irrelevant and immaterial and not a part of the cross-examination.

The Court: No, but gentlemen, are we not getting tangled up here a little? Now as I understand it, this particular section relied on by Mr. Hildebrand, who appears for the plaintiff in this action, is a law of the United States. The Interstate Commerce Commission has got nothing to do with that. However, they can make certain designations; for instance, they can say that the rungs on the ladder must be a certain kind of steel and a certain size. But the statute itself says that ladders used by brakemen on freight trains must be secure ladders. They don't say what will be a secure ladder. That is the question that is left to the jury. Now the Interstate Commerce Commission can't— [fol. 171] they will say "Here, the ladder has got to be— the rungs so far apart, the rungs so thick," perhaps one thousand and one things that they could specify but still it would remain for the jury to determine whether or not this matter furnished is a safe ladder. Of course, there is this protection to the railroad that any order that the Interstate Commerce Commission makes, you can't predicate negligence on a compliance with that order, whether they are right or wrong.

To which ruling of the court the defendant then and there duly excepted.

(Witness Holt continuing on cross-examination):

I am familiar with the equipment of the Southern Pacific. The Southern Pacific has cars similar with flat braces in back of the ladder. On our equipment we have no diagonal rod extending out nearly an inch from the side of the car, but we have in addition to our flat braces some cars equipped with braces made of angle iron which extend out. These are attached to the side of the car in a similar manner.

Redirect examination.

By Mr. Lockwood:

We have had trouble with these flat braces buckling. The flat brace is similar to the rod and in some cases the hand hold itself or ladder is secured to this flat brace. Through the action of the load in the car movement in switching, [fol. 172] this brace becomes bent, therefore if it is in between the hand hold or the ladder and buckles outward

there is a violation because the law states that it shall have a clearance of two inches. And in many cases cars are shopped for that defect alone. In other cases it is buckled below and does not interfere with the ladder whatsoever.

Q. How close have you seen them buckle to the ladder? In other words, have you seen them come to the ladder?

A. That is out to the ladder itself?

Q. No, the portion of the rod behind the ladder or the portion of the brace behind the ladder, how close does it have to be before the car is shopped?

A. We have to shop the car.

Q. In other words, within two inches?

A. Yes, in violation of the law.

Q. And whenever you would find that condition you have to send it to the shop?

A. Yes, sir, or have it repaired.

Further redirect examination.

By Mr. Lockwood:

Q. State, Mr. Holt, whether you consider this car in question in this case, that brace as it is in the position it is, taking into consideration also the Interstate Commerce requirements as to clearance and as to a secure ladder and hand holds, state whether or not that is, in your opinion, [fol. 173] a well constructed car to meet the—all requirements of safe practices in railroading?

A. It does.

Michael Meehan, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am an employee of the Southern Pacific Company. My business is master car repairing. I have held that position eleven years. Prior to that time and for six years I was journeyman car foreman for the Southern Pacific. I have been in railroad work since 1898. General car work and as chief inspector and car foreman. I have examined Defendant's Exhibit No. 4 and Plaintiff's Exhibit No. 4 and

I am familiar with the type of car shown in these exhibits. I am also familiar with the brace rod on the side of these cars that extends under the side ladder. I have observed these cars and have observed their use for many years. I am familiar with the specifications laid down by the Interstate Commerce Commission in regard to the side ladders on freight cars. It is my opinion that the side ladder on these cars is secure and that the side ladder and hand holds are safe. It is also my opinion that there is nothing on these side ladders on these type of cars that interferes with the [fol. 174] free use of the ladders by the brakeman. I am familiar with the type of equipment where flat braces are used instead of round ones. I have observed that the flat braces have a tendency to buckle, and when these flat braces buckle they interfere with the use of the car under the rules of the Interstate Commerce Commission.

Q. Do you consider this type of car involved in this case, so far as the side ladder is concerned and the rod underneath the ladder, from the railroad man's standpoint and safety standpoint of the men working on them, do you consider them perfectly safe and proper equipment?

A. Yes, sir.

Redirect examination.

By Mr. Lockwood:

Q. Now, Mr. Meehan, I will hand you Defendant's Exhibit No. 7 and ask you to examine it and Defendant's Exhibit No. 8, those cars showing braces across underneath the side and end ladder. How long has that type of equipment been in use generally on the railroad?

A. For a number of years. We have got them for the past fifteen years in our own line; similar, very similar.

Q. Yes, and is it necessary for the proper construction of these cars to give the ends of the cars the proper support, is it necessary to have some sort of a brace rod there?

A. Yes, sir.

[fol. 175] Q. And is it your opinion that these round brace rods not only answer the purpose but are just as safe as any other type of equipment?

A. More so.

Q. And you might say why.

A. Because being constructed of round iron an inch and one-eighth rod with up-set ends one and one-half, if any expansion takes place the rod drops down. It doesn't buckle out in the same manner as flat iron will.

Q. You would consider them more safe equipment then than the older type?

A. Yes, sir.

Recross-examination.

By Mr. Hildebrand:

Q. You say that similar equipment is used by the Southern Pacific. They don't use this rod device on any of the cars that you know of, do they?

A. I was referring to Exhibits Nos. 7 and 8.

Mr. Lockwood: Yes, he was referring to these two exhibits here.

Q. Well, have you seen a Southern Pacific car with a rod similar to that type?

A. I didn't speak of rods, I said similar to that type, Exhibits 7 and 8.

Q. Oh, well, I am asking you about——

A. Oh!

[fol. 176] Q. (Continuing.) Exhibit 4. Have you ever seen any Southern Pacific equipment of that type?

A. No.

Mr. Lockwood: That is repetition. That has already been asked and answered.

Q. You have never seen any equipment where this rod or brace is out from the side of the car and behind the ladder, have you?

A. Yes.

Q. Except this?

A. Yes, other foreign lines have got similar equipment.

Q. What foreign lines?

A. I couldn't say offhand. I have no recollection of them.

MR. C. L. DOANE, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am car foreman for the Western Pacific Railroad. I have held this position for eight years. For three years prior to that I was coach foreman for the Western Pacific Railroad. Prior to that time I was car inspector and general car repairman. I have examined Defendant's Exhibit No. 4 and Plaintiff's Exhibit No. 4 and I am familiar with the type of equipment shown on these exhibits. I have observed the use of that type of equipment. I am familiar with the requirements of the Interstate Commerce Com-
[fol. 177] mission as to secure hand holds and the clearance thereof. This type of car conforms to the requirements of the Interstate Commerce Commission. The side ladder and hand holds on these cars are secure and safe. The rod underneath the ladder and between the ladder and the side of the car is not calculated in any way to interfere with the safety of using the ladder. I am also familiar with the type of equipment where a flat rod is used behind those ladders. I have seen instances of having difficulty with them on account of buckling. It is my opinion that the type of equipment shown on Plaintiff's Exhibit No. 4 and Defendant's Exhibit No. 4 is better than the old type where a flat rod was used. A round iron doesn't buckle as easily as a flat brace, or as quickly. When a rod buckles under the ladder that may interfere with the clearance so that you will have to send the car to the repair shop; and if the clearance is interfered with someone might really get hurt upon them.

I am familiar with the type of equipment shown in Defendant's Exhibits 7 and 8. It is my opinion that the type of equipment shown in Defendant's Exhibit 4 and Plaintiff's Exhibit No. 4 is safer than that shown in Defendant's Exhibits 7 and 8.

[fol. 178] Cross-Examination.

By Mr. Hildebrand:

The Western Pacific Company does not use the type of equipment involved in this case. That is, the type of equipment referred to in Defendant's Exhibit No. 4.

LLOYD E. CARTMILL, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am general superintendent of the car department of the Pacific Fruit Express Company. I have held that position about a year. Prior to that time I was assistant general superintendent of car department for about eight years; and have also been car builder, car inspector, superintendent of shops and foreman. I have examined Defendant's Exhibit No. 4 and Plaintiff's Exhibit No. 4 and I am familiar with this type of equipment. I have observed this type of equipment many times in our yard. I am also familiar with the requirements of the safety appliance laws as to clearance, etc. In my opinion the type of car shown in Plaintiff's and Defendants' Exhibits No. 4 complies with the safety appliance laws. There is nothing in this type of equipment that interferes with the safe use of the ladder. The ladder and hand holds on this type of [fol. 179] equipment are safe and secure. I have observed other types of equipment where flat rods or braces are used. I have seen instances where these flat rods buckled. I have seen them buckle until they would foul the grab iron. They would buckle beyond the specified clearance for safety. I would say that the equipment involved in this case was just as safe as any other type of construction as long as it didn't foul the specified clearance for the grab irons or hand holds, which clearance is two inches.

Cross-examination.

By Mr. Hoey:

Q. Well, now as I understand it is your opinion, if a person was coming down with his feet first, as they naturally have to, and we will say his right leg came in contact with that round brace as shown in that diagram and the weight of his body went on that brace, it is your opinion that that would be a safe appliance, is that true?

A. Well, I would say that if a man would step on something that would trip him up or cause him to lose his balance would—might have—contributes to his fall, of course,

I don't know that but in answering that this ladder—these rungs, according to the safety appliance laws, must clear [fol. 180] all obstructions underneath this tread two inches and that is considered safe for a hand hold or foot hold. Now, as I have explained it, this rod coming through here has the proper clearance, in fact, it has more than the two inches. It has two and five-eighths on every one that I have measured. I have measured several of them, and I have found them to clear that two and five-eighths, and the same thing would apply anywhere under that rung. There is plenty of things, bolts on various cars that I have seen, there may be obstructions under the ladder that a man might catch his toe on if he stuck his foot through there. He might stick his foot through that ladder and fall. There is nothing to stop him from doing that, but we consider any clearance of two inches or more to be a safe ladder coming down the car.

Q. And just tell us of any brace of any kind that you have seen before, that was not attached to the side of the car as this is, except on the end of the car. Will you give us the name of any company that has such a car?

A. I don't know of any right at the present time that are constructed that way.

Q. Your company doesn't use them, do they?

A. We don't use this type.

[fol. 181] FRED J. DODDS, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live in Topeka, Kansas. I am general car inspector of the Santa Fe System. I have held that position nine years. I have had thirty-three years' experience with the Santa Fe; four years as car carpenter; about five and a half years as supervisor of building new cars and repairing cars in shops; about six years as supervisor of safety appliance with the Santa Fe, and about eight years as assistant mechanical valuation engineer. I have had about six years' experience in equipping or in getting out plans and specifications and supervising the equipment of our own cars in

accordance with the present safety appliance requirements of the Interstate Commerce Commission in regard to the side ladders on freight cars. I am familiar with the type of cars involved in this case. It is my opinion that the side ladders on the type of cars shown in Defendant's Exhibit No. 4 are secure. It is my opinion that the ladders on this type of cars are secure. It is also my opinion that these side ladders are safe and that there is nothing in connection with the side ladder or side rods under the side ladders that interferes in any way with the safe use of the ladders. I [fol. 182] have had experience with flat rods instead of round rods. The objection to the flat rod from the car construction viewpoint is, that it stretches and becomes useless as an anchor, which is the paramount feature for a brace of that kind, and it is necessary to remove them when they stretch and are buckled out and from the safety standpoint, if they happen to buckle under the ladder treads it causes safety appliance defects and the car must be shopped at once to get rid of that defect.

On August 27, 1931, the Santa Fe had 6500 boxcars and about 500 furniture cars of the same type of cars that is involved in this accident in general use. 7,000 altogether. This type of car first came out in 1929. I am familiar with the standard specifications of the Interstate Commerce Commission in regard to ladders and their secureness. In my opinion the type of ladder on the class of cars involved in this case conforms with the requirements of the Interstate Commerce Commission.

Cross-examination.

By Mr. Hoey:

I base my answer that this is a safe appliance because it complies with the rules of the Interstate Commerce Commission. We are guided by the Interstate Commerce Commission rules and regulations. I have been up and down the sides of a great many cars in my life and have been up [fol. 183] and down the ladders of cars that have this slanting rod there. It is 17 inches between the rungs of these side ladders.

Q. Then, as I understand, that if a person descending this ladder his right foot would come in contact with that rod and his foot would slip, whatever it may be, six or seven

inches, still in your opinion that would be a safe rod, is that true?

A. Yes, sir.

Q. You never saw this appliance on any car on any railroad prior to 1929, did you?

A. Not this particular rod, no.

Q. And you know as a fact that all other railroads——

The Court (interrupting): Did you ever see any similar rod?

A. Not a rod, Your Honor.

The Court: The question is this—what Mr. Hoey wants to find out is this—of whether or not prior to the introduction of this ladder on this particular car did you ever see a car with a slanting rod back of it, whether it was square or flat or round, that wasn't connected with the back of the car, that was standing out close to the ladder. That is what Mr. Hoey's question is, is it not, Mr. Hoey?

Mr. Hoey: That is correct.

A. In answer to that question, yes, I saw them ever since I have been in the car business. There are certain types of cars that have that kind of a brace sticking out from the [fol. 184] wall of the car from two and a half to three and four inches.

The Court: With the same slant?

A. With the same slant, Your Honor.

Q. Now just tell us the name of the railroad that had a car with a rod of this kind on, standing out away from the boxcar, not attached to the car except on the end, what railroad had that?

A. I didn't state that it was a rod.

Q. What is that?

A. I said in answer to the judge's question I said a similar condition where it stood out from the car.

Q. Was it behind the ladder?

A. Yes, sir.

Q. And was it attached to the boxcar at places other than at the ends as this rod is?

A. Yes, sir.

Q. It was attached to the boxcar, wasn't it?

A. Yes, sir.

Q. Yes, but you never saw at any time a rod of this na-

ture, that is, just attached to the end and standing out separate from the boxcar, behind the ladder, have you?

A. Not a rod, no, sir.

Q. Well, a rod; we will be more liberal and say, did you ever see a band or a brace or anything that stood out from the boxcar?

A. Yes, sir.

Q. And attached only at the ends?

A. Yes, sir, I have seen braces standing out from the car ever since I have been in the business.

[fol. 185] Q. Now, Mr. Dodds, so that there will be no question, you say that you have observed a brace or rod or some obstruction of some kind standing out on a boxcar, away from the boxcars themselves, behind the ladder, and just attached to the car by just simply the ends of this rod or brace, is that true?

A. Yes, sir.

Q. All right. Now what company has such a contrivance as this?

A. Every railroad company in the United States and Canada that has a stock car has a similar situation.

Q. Did you ever see it with any cars of the Southern Pacific Company?

A. Yes, sir.

Q. Have the Southern Pacific Company today any cars that has an appliance of this kind?

A. Do you mean a rod now or a similar projection standing out?

The Court: Here is what we mean now, see if you can answer Mr. Hoey's question. The question, outside of this particular device that any car that you know of, any car that is equipped with a rod back of the ladder, two and one-half inches back of the ladder, that has a slant to it.

A. There is no car that I know that has a rod but there is thousands of cars that do have a projection underneath the ladder standing out from the sides of the car, from an inch and a half to four inches.

The Court: All right. Well, now, is there—that rod that [fol. 186] you speak about that stands out, has that got a slant?

A. Yes, sir, it is a diagonal brace.

The Court: A diagonal brace?

A. Yes, sir.

The Court: And there is nothing on that brace to prevent you from slipping any more than you would on this rod?

A. No, sir.

Q. How far is that brace from the ladder?

A. Well, that varies from the requirements of two inches up to two and a half.

Q. Can you show—you knew when you were coming here, Mr. Dodds, you were coming here to testify to this particular matter, did you not?

A. Yes, sir.

Q. Yes, and you are the general car inspector for all cars on the Santa Fe Railroad, is that true?

A. Yes, sir.

Q. Can you get us a photograph of any car that has a slanting rod on it like this is of any other railroad outside of the Santa Fe?

A. No, sir, not a slanting rod. You understand me, no slanting rod but a slanting diagonal brace that a man can slip on.

Q. Standing right out in the air?

A. Yes, sir.

Q. All right, then. Would you be kind enough to get that photograph for us?

A. You have one in evidence here.

Q. All right, sir. That is just what I want to see. Just pick it out, Mr. Dodds. Just pick out which one.

A. One of the photographs.

[fol. 187] Q. Just pick out the photograph that illustrates your point there.

A. (Witness hands photograph to counsel.)

Q. Well, isn't that, Mr. Dodds, isn't that attached to the side of the car? Isn't there twenty bolts?

A. Certainly, but it stands out an inch and a half from the car. It don't make any difference whether it is attached to the car or not as long as it stands out away from the car your hazard is there.

Q. Well, Mr. Dodds, that isn't my question. The jury can decide that. Mr. Dodds, can you tell us—perhaps you misunderstood the question. Do you know of any company that has a car that has a brace that stands out in air like this rod does, that is, not attached to the car any place

other than on the ends of the brace, and if so, what company?

Q. Mr. Dodds, you say that one of the reasons that they have this—one of the objections to these other cars with the rods or the irons attached to the car is that they buckle. Do I understand you to say that?

A. Yes, sir.

Q. And when they buckle, then that becomes a hazard, does it not?

A. It is not a hazard, a penalty defect.

Q. A defect, and how much do they buckle when they buckle?

A. Well, I have seen them buckle an inch. I don't know how much more they might buckle but I have actually saw them buckle an inch.

[fol. 188] Q. And then that becomes—it becomes a defect, as you say, because it is out closer to the ladder, is it not?

A. If it is under.

Q. Where it interferes with the person's feet going up and down the ladder, isn't that true?

A. If it is under the ladder tread and it buckles out until you haven't got the required two inch clearance then you have a penalty defect.

CHARLES M. COHEA, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I live in Richmond. I am a brakeman. Have been a brakeman off and on since 1912. I have been a brakeman for the Chicago and Eastern Illinois Railroad and for the Pennsylvania Railroad, and have been brakeman on the Santa Fe since July, 1925, that is, off and on. I was one of the brakeman on the train when Mr. Scarlett was injured. I am familiar with the type of equipment involved in this accident. As brakeman I have occasion to go up and down ladders on this type of equipment many times. In my opinion the ladders on this type of equipment are secure. It is my opinion that the ladders are safe on this

equipment. I think there is nothing about this side rod underneath the ladder that interferes in any way with the safe use of the ladder.

[fol. 189] Q. Are you familiar with the rule of the Santa Fe in force at that time that "every employee should report promptly to his foreman, some member of the Safety Committee or any other proper person all unsafe conditions or practices," are you familiar with that?

A. Yes, sir.

Q. And have you ever had occasion to report this type of car as unsafe in that respect?

A. No, sir, I never did.

Cross-examination.

By Mr. Hildebrand:

My toe has struck this brace rod when I was descending a ladder, but I can't say it interferes with the toe as I descend the ladder.

R. S. Edmunds, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am a freight conductor for the Santa Fe. Have been since 1919. Between 1912 and 1919 I was brakeman for the Santa Fe. I was with the Great Northern before that. I am familiar with the type of car involved in this case. I have gone up and down the side ladders on these cars many times. I have observed their construction particularly with reference to that rod behind the ladder. In my opinion the [fol. 190] side ladder and hand holds on this type of car are secure. In my opinion they are safe, and it is my opinion that the presence of that rod there does not interfere with the safe use of the ladder. Your toe will strike against it very occasionally. If you are careful and use the proper care there isn't any danger whatever. Your toe will also strike projecting bolts or nuts on the sides of the cars.

Cross-examination.

By Mr. Hildebrand:

When the toe hits a projecting nut it will probably go straight down and when the toe hits a slanting brace if you don't know it is there, would slide down. Mine did. It would slide down the way the bar runs.

Redirect examination.

By Mr. Lockwood:

Q. And if there was an instance where the toe would go through a little further and slides, the natural tendency would be that the toe would slide down to the rung of the ladder?

A. The natural tendency would be to take the weight off that foot quickly and let your foot slide on down to where it belongs and then on down.

[fol. 191] E. D. HUBBARD, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lockwood:

I am a Santa Fe freight conductor. I have been conductor since 1925. I was a brakeman between 1913 and 1925. I am familiar with the type of car involved in this case, and particularly with the position of the side rod under the side ladder. In my opinion the side ladder and hand holds on these types of cars are secure and safe.

Q. Is there anything in that rod underneath the ladder that interferes with the safe use of the ladder?

A. Nothing that I know of.

Cross-examination.

By Mr. Hildebrand:

Q. Did you ever strike that rod with your foot or toe?

A. I have on different occasions, yes sir.

Q. And the rod is so located that it interferes with your foot or toe when you descend with your right foot, doesn't it?

A. It is if your foot goes in very far inside of the rung of the ladder.

Q. You are still employed by the company?

A. Yes, sir.

[fol. 192] Redirect examination.

By Mr. Lockwood:

Q. You are familiar with this rule that every employee should report promptly to his foreman or some member of the safety committee or any other proper person all unsafe conditions or practices, aren't you?

A. Yes, sir.

Q. Did you ever have occasion to report that as an unsafe condition there?

A. No, sir.

The defendant rests.

Emery E. Smith, witness for the plaintiff, called in rebuttal, testified as follows:

Direct examination.

By Mr. Hildebrand:

We have a good many lines of contact with railroads; one is inspecting new material, another is that of investigating equipment for refrigerating cars, the inspection of tank cars, oil cars, and the ordering of cars for the shipping of materials with which we have to do. We have done some odds and ends of inspection work for the Santa Fe. During the war we had to assign and direct many cars. The type of car shown in Plaintiff's Exhibit No. 4 is generally termed a single sheath steel-end car. I have observed quite a number of this type. The corner brace rod on this car is fastened by two castings, one casting is bolted on to the [fol. 193] corner of the end and the other one the under-corner or a little back of the corner.

Exception No. 19

Thereupon the following proceedings were had:

Q. In your opinion, Mr. Smith, is that rod as it is constructed there and as it is constructed in cars of this type safe or unsafe?

Mr. Lockwood: Just a moment. It is objected to for the reason that this witness, however qualified he may be in some particulars, is not shown to be qualified in railroad construction and as to the safety features of railroad construction as laid down by the Interstate Commerce Commission. We object that the witness is not properly qualified to give his opinion on this under the record.

The Court: Well, now, on what basis is Mr. Smith going to testify in regard to that?

Mr. Hildebrand: Well, in direct examination the other day I didn't go into the—repeat all his qualifications. He testified that he had some twenty-nine years of experience as an expert in engineering standards and safety inspections and all kinds of work in that connection with a great many different concerns, a wide and varied field, including the railroad field, and I take it that he is exactly the kind [fol. 194] of man who could give us an opinion as to the safety factor here that would be of value.

Mr. Lockwood: It is further objected to because the Interstate Commerce Commission has set forth the standards, has ordered its standards and the uncontradicted evidence is that this appliance complies with the standards fixed.

Mr. Hildebrand: Oh, true.

The Court: I tell you, Mr. Lockwood, we don't agree quite on that. I think there is a little confusion either in the court's mind or in someone else's mind in regard to that. Now in one particular and perhaps in all particulars—by the way, ladies and gentlemen of the jury, from anything that the court says in discussing these questions with counsel the court has no opinion as to whether or not this was a safe appliance or not. That's something that you have got to determine yourselves. Now the Interstate Commerce Commission says it must be two or two and one-half inch clearance. Well, now, what would you say supposing there was a bolt with a pointed end, that

if you would stub your toe against it it would run into your foot, now that would comply with the Interstate Commerce Commission rule in regard to clearance but the result would be that you would stub your toe against a sharp instrument that would penetrate your foot and would you say that that would have anything to do with the matter at all?

[fol. 195] Mr. Lockwood: No, it wouldn't have if it came no nearer than two inches to the appliance. It would have nothing to do with the safety of the appliance.

The Court: No.

Mr. Lockwood: It might be if an action were brought for negligence, as has been brought here, but now waived and is out of the case, why that is a different matter, but so far as the appliance is concerned, the ladder itself, a bolt sticking out wouldn't have anything to do with the safety of the ladder. The same as this rod here is back of the appliance, back of the hand holds, back of the ladder more than two and one-half inches and therefore complies with the standards we claim that the safe——

The Court: Well, I can see clearly your viewpoint but the opinion of the court is that the location of the ladder and its arrangement and the whole feature is involved in that question of putting up a secure ladder and security means secure for those people who have to use the ladder. Now I may be mistaken but that's my understanding of the law. There is merit, at least it is not groundless, but at the same time it is not the view that the court takes of the matter.

Mr. Lockwood: I object to this question, however, to this witness for the fact that I don't think the foundation has [fol. 196] been laid. I don't think he should be permitted to answer that question.

The Court: Well, hasn't there been a good deal of latitude allowed in that particular? Haven't you put in car foremen and so on?

Mr. Lockwood: Nobody but railroad men.

The Court: They weren't brakemen?

Mr. Lockwood: Well, but they were railroad men and familiar with that as railroad men and familiar with the things necessary for the safety of railroad men. As I say this witness, no doubt, in his own field of endeavor is a man that knows what he is talking about but I don't

think counsel ought to ask him into the field of railroading, particularly when he is passing on the safety feature for men. In other words, I think counsel has picked out a man who is an engineer in some lines and endeavored to make him an expert in this line to establish safety features or establish features that are not safe.

Mr. Hoey: I think, if Your Honor please, a man who constructed the car testified as to the safety.

The Court: Well, but that is a man who is engaged in that line of business. It is not—that problem is not entirely free from difficulty as to how far we are going as to who can give an opinion in regard to the safety of this matter. You urge your question, do you?

[fol. 197] Mr. Hildebrand: Well, I don't want to urge it if there is any question about it, Your Honor. Let me ask Mr. Smith, let me go back to the other question as long as there is some question about this and let me ask Mr. Smith about this.

Q. As an engineering matter do you know whether or not this brace rod could have been imbedded in a brace steel grooving?

Mr. Lockwood: Just a moment. That is objected to as wholly immaterial under the issues in this case because there is no question but what one thousand different methods might have been pursued. That is wholly possible; the location as is shown by the record here, countless cars, they are all differently constructed and whether this could have been made differently is entirely beside the mark. Of course, we admit that the car could have been made differently because we have other cars that are made differently and it wouldn't prove anything and therefore we object to it for that reason.

The Court: I don't see that that is material. If it is unsafe it is unsafe.

Mr. Hildebrand: Yes, I guess that is true. Well, now, let me ask just a few more questions.

Q. Mr. Smith, what qualifications have you as a safety engineer?

[fol. 198] A. Well, I have—I have been—we have been doing safety engineering for a great many years and we grew up in the railroad family of California. I helped to

reorganize all the Southern Pacific lines in Oregon; Charles Markham and myself reorganized all their lines in Oregon and I have had to do for many years with safety matters.

Q. In connection with engineering construction?

A. We do a large amount of engineering construction. We had at the—when the slump came in 1929 we had seventeen million dollars' worth of construction work in our office.

Q. And have you made any study of the safety methods in connection with construction work?

A. We have. We are constantly engaged more or less in consideration of safety from one angle or another.

Q. Have you observed this type of construction with reference to giving an opinion as to whether or not it is safe based on the standards that you have as to safe equipment?

A. Well, I have climbed up and down a great number of these cars, twenty or thirty, with that view and it is my opinion——

Q. And did you form any opinion from your observation and your experience in that connection?

[fol. 199] A. I found that my foot would invariably slip on that rod and any obstruction of the free movement of the brakemen going up or down a ladder I would consider extra hazard.

Q. And is it safe or unsafe in your opinion?

A. I consider it an unsafe appliance; one that may at any time be unsafe.

To which ruling of the court the defendant then and there duly excepted.

Cross-examination.

By Mr. Lockwood:

I have never been a railroad brakeman. I have experimented. I have never been a railroad conductor except on occasions when they drafted me into excursions or something of that kind, a matter of friendly obligation. I have never been a car inspector in the employ of a railroad, although we have inspected many hundreds of cars. I have done car designing in refrigerator car designing for new processes and cold cars, things of that kind, special commodity cars for manufacturers upon which we were engaged, but have never been engaged in the designing of

regular routine cars. I am not familiar with the Interstate Commerce Commission standards, only in a very general way.

STIPULATION RE LIFE EXPECTANCY

It was stipulated that a man fifty-four years of age has an expectancy of life of 18.09 years.

[fol. 200] JOHN F. STRUBY, a witness called in rebuttal on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Hildebrand:

I have been a railroad man for about thirty-three years. My work has been switching, yard service. I have worked for the Santa Fe approximately twenty-three years. I severed my connection with the Santa Fe about two weeks ago.

Q. Now are you familiar with the type of car we have been discussing here which is shown in that picture right by you, Defendant's Exhibit No. 4?

A. I will have to put my eyes on. I am too old.

Q. Just take a look at it with reference to the brace rod in the corner under the ladder.

A. Yes, I am.

Q. And have you worked on many of those cars of that type and description?

A. Not a great many, no.

Q. About how many would you say you have worked on?

A. Oh, practically one hundred, something like that.

Q. And in working on those cars have you worked as a brakeman?

A. As a switchman.

Q. As a switchman?

A. Principally.

The Court: Mr. Struby, your business is switchman?

A. Yes.

[fol. 201] The Court: Does that require you to climb up and down these ladders?

A. Practically the same as a brakeman, Your Honor.

The Court: Practically the same as a brakeman? All right, proceed.

Q. And in climbing up and down these ladders state whether or not the brace rod, the slanting brace rod under the ladder interferes with the free use of your feet?

A. Yes, it does.

Q. To what extent?

A. Well in going up and down the ladder either one. Practically more so coming down. Your toe will hit the brace rod.

Q. In your opinion is it safe or unsafe, that obstruction?

A. It is unsafe.

Q. Unsafe?

A. Unsafe.

Q. Why?

A. Because when you are coming down the ladder or going up the ladder your toe will come in contact with that rod and you are bound to slip. It will throw you off of balance.

Cross-examination.

By Mr. Lockwood:

Q. Well, now there are thousands of cars with other projections sticking out from the boxcars such as bolts and heads of bolts and nuts and braces, are there not?

A. Absolutely, yes.

[fol. 202] Q. And a man's toe can also strike those and slip, can it not?

A. A man's toe will strike them, possibly slip, but you can go down straight in place of slanting and slip.

Q. Well, you might go down straight if your toe struck the slanting rod there? You might go down straight, might you not?

A. You will go down straight but you will hit the bar on the hand rail with your foot.

Q. Did you ever report that as an unsafe condition?

A. No, I did not.

Q. You were how long working as a switchman for the Santa Fe?

A. I worked practically twenty-three years.

Q. Were you familiar with the rule that every employee should report promptly to his foreman or some members of the safety committee or other proper person all unsafe conditions or practices?

A. Absolutely, yes, sir.

Q. You are familiar with that rule?

A. Absolutely.

Q. But you never reported this condition of these ladders or the rod underneath the ladders as an unsafe condition or practice, have you?

A. I never have, not this occasion, no.

[fol. 203] CLARENCE CRAIG, called as a witness on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hildebrand:

I am employed by the Santa Fe as a switchman. I have had experience with the type of cars involved in this case for about four years. I have had occasion to go up and down these cars. In going up and down these cars the brace rod behind the ladder interferes with your foot.

Q. And you consider it safe or unsafe in that connection?

A. I did consider it unsafe but was advised that it complied with the law in regards to clearance. My opinion is now that it is unsafe.

Cross-examination.

By Mr. Lockwood:

Q. Are you familiar with the rule that every employee should report promptly to his foreman, some member of the safety committee or other proper person all unsafe conditions and practices?

A. Yes, sir.

Q. Did you ever report that condition of that side ladder on that type of car and the brace under it as an unsafe condition?

A. No, not to any member of the safety committee. I [fol. 204] make inquiries about it and was told that it complied with the requirements of the law.

Q. And so far as you know it does comply with the requirements of the law, doesn't it?

A. Yes.

THEODORE SHAFER, called as a witness on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination.

By Mr. Hildebrand:

I am a railroad man. I have been working for the Santa Fe since June, 1923. I have been railroading altogether about twenty-nine years. I am a switchman. I am familiar with the type of car shown by Defendant's Exhibit No. 4, and have handled quite a number of those cars. I have had occasion in my work many times to go up and down the side ladders of that type and description. The brace rod on this ladder interferes with the free use of your feet. I would call it unsafe.

Cross-examination.

By Mr. Lockwood:

Q. Let's see, Mr. Shafer, you have got some demand or claim against the Santa Fe right now for a great many thousand dollars for some grievance of your own, haven't you?

[fol. 205] Mr. Hildebrand: I don't believe that pertains to this case, Your Honor.

The Court: Well, you may answer it, Mr. Shafer. The question is whether or not you have a lawsuit pending, that is against the defendant in this action.

A. I don't know.

Q. What is that?

A. I don't know.

Q. Well, you have got a claim or demand that you are bringing against the Santa Fe right now, haven't you?

A. I don't know whether the claim has been filed or not.

Q. Well, but you are demanding some damages in a case of your own right now?

A. Yes, sir.

Q. Whether or not you have got a case in the court or not, aren't you?

A. Yes.

Q. Yes.

A. Yes.

Q. Yes, you claim to have been injured some time ago while in the employ of the Santa Fe, don't you?

A. Yes.

Q. Isn't that right?

A. Yes, sir.

Q. And now you are demanding at this time damages under the Federal Employers' Liability Act for large sums of money, aren't you?

A. I suppose I am.

Q. Yes, certainly. So you have got a—you are an interested witness, aren't you?

A. I wouldn't say so in this case.

Q. You would like to see the Santa Fe stuck in this case and every other case, wouldn't you?

[fol. 206] A. Not necessarily, no. I have no grievance against the Santa Fe.

Q. Now you are familiar with this rule, "Every employee should report promptly to his foreman, some member of the Safety Committee or other proper person all unsafe conditions or practices"? Are you familiar with that?

A. Yes, sir.

Q. Did you ever report that ladder or the rod behind that ladder as unsafe practice?

A. No, I never did.

Redirect examination.

By Mr. Hildebrand:

Exception No. 20

Thereupon the following proceedings were had:

Q. And you are trying to effect a friendly settlement of your differences with them?

Mr. Lockwood: Just a minute. I object as not proper redirect examination.

Mr. Hildebrand: Well, you intimated a lawsuit.

Mr. Lockwood: Just a minute. I object to that as not proper redirect examination.

The Court: What is the last question?

(Question read by reporter.)

Mr. Lockwood: We object to that as not proper redirect examination.

[fol. 207] The Court: Well, you asked him about some claim that he had pending against the Santa Fe Railway. The objection overruled.

Q. Is that true?

A. Yes, that is true.

Q. And if you do effect a settlement you expect to go back to work for them?

A. I would.

To which ruling of the court the defendant then and there duly excepted.

Recross-examination.

By Mr. Lockwood:

Q. What sort of friendly settlement are you trying to get from the Santa Fe right at the present time? Just tell us that.

A. Well, I couldn't tell you. It is up to my attorney.

Q. How many thousands will you consider a friendly settlement of your claim against the Santa Fe right now?

A. I think that is irrelevant to the case.

Mr. Lockwood: Well, now, that is for His Honor to rule on.

Q. This is the question, you just answer that question.

Mr. Hildebrand: Well, now, Your Honor——

The Court: Well, do you object to the question?

Mr. Hildebrand: I object to the question on the ground it is incompetent, irrelevant and immaterial.

[fol. 208] The Court: Well, the objection is sustained.

Q. It is. However, you do have an unsatisfied demand against the Santa Fe right now, haven't you?

A. I guess that is what you would call it.

Q. And you haven't effected any so-called friendly settlement yet, have you?

A. No.

Mr. Lockwood: No. All right, that's all.

Plaintiff rests.

At this juncture the jury was taken outside the court room to inspect a freight car of the same type as that involved in this accident.

Exception No. 21

Thereupon the following proceedings were had:

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Lockwood: Comes now the defendant at the close of all the evidence and after both sides have rested and moves the court to direct a verdict in favor of the defendant and against the plaintiff and instruct the jury to return a verdict in favor of the defendant and against the plaintiff for the following reasons:

First. That plaintiff has failed to prove the defendant guilty of any negligence that caused or contributed to the accident or to any damages sustained by the plaintiff.

Second. The uncontradicted evidence shows that the plaintiff assumed the risk of all danger in connection with [fol. 209] the freight car down which he was climbing at the time he received his injuries; that these risks were open, obvious and fully known to and appreciated by the plaintiff.

Third. That the plaintiff had full knowledge of the character, type and construction of the car on which he was working or about which he was working at the time of his injury.

Fourth. That the plaintiff has not pleaded any failure of a safety appliance on this car in question and no issue has been tendered or joined with reference to any safety appliance defect.

Fifth. That plaintiff has failed to prove any safety appliance defect on the car in question; that the uncontra-

dicted evidence is that the car in question conforms to the specifications ordered by the Interstate Commerce Commission and no jury can be permitted to speculate regarding the said safety appliance feature.

Sixth. That the clear weight of the evidence is that the car in question was provided with a secure side ladder and that the same was safe and that there was nothing thereon that interfered with the safe use thereof by any employee.

Seventh. That the jury should not be permitted to speculate as to the character, kind or location of the anchor rod underneath the side ladder of this car for the reason that the uncontradicted evidence is that it conforms and did conform to the specifications ordered by the Interstate Commerce Commission.

[fol. 210] Eighth. That the evidence is insufficient to support a verdict in favor of the plaintiff.

Ninth. That if the jury should return a verdict in favor of the plaintiff and against the defendant the court would be required to set it aside because it would be against the weight of the evidence.

I think that's all.

The Court: The motion is denied.

To which ruling of the court the defendant then and there duly excepted.

INSTRUCTIONS OF THE COURT

Exception No. 22

Thereupon the court instructed the jury as follows:

You have listened to all the testimony in this case and the arguments of counsel and it now becomes my duty to instruct you concerning principles of law that are applicable to the case that you have heard. These instructions are written and they will be read to you by me. Before reading these instructions I deem it proper that I should direct your attention to the prominent issues in this case so that you may better understand the issues you are to decide. The plaintiff in this case for cause of action depends entirely upon the Safety Appliance Act, which is

a federal statute. His claim is that the way this ladder was, I would say, placed rendered it insecure. Now the [fol. 211] insecurity or security of that ladder is a question that rests entirely with you. I should not, and I do not want to or do not intimate in any way anything concerning the facts in this case or how you should find these facts. Simply at this time I am directing your attention to the real issues in the case. Now that presents the first question: Was that ladder reasonably secure for use by the men who had to use it, to-wit: the brakemen on these freight trains. The law does not require a railroad company to be an insurer of the safety but it must be reasonably safe so far as reasonable and intelligent human ingenuity can devise a safe ladder. Now if you find that that ladder was not insecure—if you find it was a secure ladder, a safe ladder, your labors are ended. There is nothing more for you to do and, by the way, I will say that in all these issues in this case and in every case it is incumbent upon the party who brings the suit, that is the plaintiff, to prove the allegations of his complaint by a preponderance of the evidence. Therefore, it is the duty of the plaintiff in this case to prove to you by a preponderance of the evidence that this is an insecure ladder. Now that's the first issue that should engage your attention. As I stated before, if you should determine that this was or is a reasonably safe ladder there is nothing more for you to consider. However, if you should find that this [fol. 212] ladder was an insecure ladder your labors are not ended. There still remains the other issue for you to determine: Was it this bar in question, this brace bar, which is the only reason you can find, at least for justifying a finding that the ladder was insecure—was this brace bar, because the evidence is all directed to that particular feature of it. Now if you should find that the ladder was insecure by reason of this brace bar there still remains the issue tendered by the plaintiff and which he must establish by a preponderance of the evidence; was it because of that brace bar that the plaintiff in this action fell from the ladder? Now if you should decide both those issues in favor of the plaintiff, and as I said before, I am not intimating in any way how you should find those issues, if you should find both issues in favor of the plaintiff, the ladder was insecure by reason of this brace

bar and the other issue would be that it was by reason of this brace bar that the plaintiff fell from the ladder, then it will be your duty to render a verdict in favor of the plaintiff and award him such damages as you deem proper, and I am not intimating in any way whether you should or should not award damages in this case. Those are questions that are entirely with you.

To the giving of the above instruction the defendant then and there duly excepted.

[fol. 213] (Continuing the court's instructions:)

The judge has got nothing to do with those questions of fact at all but, however, if you should come to the question of damages you will keep in mind that the law provides that in cases of this kind no exemplary damages can be allowed, that is, damages by way of punishment. You can only award what is called compensatory damages, that is, such sum as will compensate the man for the injuries he has received, if any. Damages in all cases must be reasonable and to enable you to determine in cases of this kind what will compensate a man for his injuries is something that must be left to you from the testimony you have heard in court and your general knowledge of the ordinary, simple, common everyday transactions of life.

Exception No. 23

Thereupon the court instructed the jury as follows:

Now with those brief and general instructions I will now read to you the instructions that have been submitted to me:

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instructions:)

Under the pleadings in this case it is admitted that this action is brought against a common carrier by railroad [fol. 214] engaged in interstate commerce and that the said carrier was so engaged at the time and place of the accident alleged herein, and this action is therefore brought under certain federal statutes. It is further admitted that at all times mentioned in the complaint the

defendant Atchison, Topeka and Santa Fe Railway was a railroad corporation engaged in the business of common carrier by railroad in interstate commerce, and that at the time and place of the accident described in the complaint and at all times mentioned in the complaint, both the plaintiff and defendant were engaged in interstate commerce. It is also admitted that the defendant, Atchison, Topeka and Santa Fe Railway, is a corporation, incorporated and existing under and by virtue of the laws of the state of Kansas and authorized to do business in the state of California, and that the defendant, Atchison, Topeka and Santa Fe Railway, at all times mentioned in the complaint was and now is engaged in business as a common carrier by railroad in interstate commerce in the county of Contra Costa, state of California.

It is further admitted that on or about the 27th day of August, 1931, at Mormon, California, that the plaintiff was in the employment of the defendant Atchison, Topeka and Santa Fe Railway in the capacity of a brakeman. The above are facts in the case admitted by the pleadings and concerning which there is no dispute.

[fol. 215] The plaintiff in his complaint alleges that on or about the 27th day of August, 1931, the train upon which he was employed by the defendant as a brakeman was halted at Mormon, California, for the purpose of setting out certain cars from said train and picking up other cars to be assembled in said train; and that at said time and place while plaintiff in his capacity as such brakeman was engaged in the reassembly of said train, plaintiff in descending from a car thereof by means of a ladder on said car encountered an obstruction to his footing and an impairment of the footing customarily provided for trainmen ascending and descending cars and that as a direct and proximate result of said obstruction and impairment plaintiff was caused to and did lose his footing and fall from said car or said train to the ground, by reason of which fall he alleges that he was injured in that the bones of his left wrist were broken and fractured, entailing a removal of certain of said bones which resulted in the permanent disability of plaintiff's left wrist, hand and arm.

Plaintiff further alleges that said obstruction or impairment to his footing consisted of a type of brace rod running diagonally on the side of said car beneath the ladder

and he further alleges that said brace rod was negligently introduced into and maintained in use and service upon said train of the defendant.

[fol. 216] Plaintiff further alleges that as a direct and proximate result of the negligence of defendant he has been wholly incapacitated from earning anything whatever and that at the time of the accident he was earning from his occupation as a brakeman the average sum of two hundred and ten dollars per month and that since said accident he has been and is totally and permanently disabled and incapacitated.

A portion of the Federal Employer's Liability Act in effect at the time of this accident reads as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

A portion of the Federal Safety Appliance Act in effect at the time of this accident relating to secure ladders on railroad cars provides as follows:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to haul or permit to be hauled or used on its line any car subject to the provisions of this chapter not equipped with appliances herein pro-
[fol. 217] vided for, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders. Provided that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

The Federal Employers' Liability Act, heretofore mentioned by the court, in effect at the time of this accident, provided as follows:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[fol. 218] Exception No. 24

Thereupon the court instructed the jury as follows:

Plaintiff being engaged at the time and place of the accident referred to in the complaint in the conduct of interstate commerce, the statutes of the state of California governing Employers' Liability and Workmen's Compensation are not applicable to this case, and plaintiff's right to recover is based on the statutes of the United States covering the liability of common carriers by railroad to their employees for injuries sustained while in the course of their employment.

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instructions:)

You are instructed that you are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in conformity with the testimony of any number of witnesses which does not produce conviction in your minds as against a lesser number. The direct evidence of one witness who is entitled to full credit is sufficient for proof of a fact in a civil case.

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.

[fol. 219] Exception No. 25

Thereupon the court instructed the jury as follows:

Under the law of this state both sides to an action frequently urge the same propositions of law from different angles and in different forms. It is the custom for each side to hand to the court such instructions as they wish read to the jury, and it is not always possible to correlate them and avoid some repetition. Therefore, in this case, because the same proposition of law may seem to be stated in various ways several times, no emphasis is intended thereby nor shall such be inferred by you. Nor are you to single out any one sentence or any one instruction, but you are to consider the instructions all together and as a whole, and harmonize them so far as you may be able to do so.

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instructions:)

If any allegation of the complaint herein is admitted as true by the answer of the defendant, then in your deliberation you must proceed upon the theory that such allegations of such complaint, for all purposes in the case, are true.

For instance, I have instructed you that the allegation that this railroad was engaged in interstate commerce, [fol. 220] that the plaintiff in this action was a brakeman, that he was employed at the time and shunting cars at Mormon and that he fell at the time or received an accident, those are all admitted in the pleadings and they are considered as true.

I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under state laws, to disregard from their minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the court in those cases, because in some respects the state and national laws conflict, and in actions under the Federal Acts, which proceed under national instead of state authority, you are bound to follow the instructions as now given to you by the court which proceeds upon national, as distinguished from state, authority.

Exception No. 26

Thereupon the court instructed the jury as follows:

You are instructed that the word secure means, among other things, safe, not exposed to danger, relief from apprehension of or exposure to danger, to make safe.

To the giving of the above instruction the defendant then and there duly excepted.

[fol. 221] (Continuing the court's instructions:)

It is admitted in the pleadings that at the time and place of the alleged injury to plaintiff, both the plaintiff and defendant were engaged in interstate commerce. In this connection a portion of the Federal Employers' Liability Act in effect at the time of this accident reads as follows:

Exception No. 27

Thereupon the court instructed the jury as follows:

"Every common carrier by railroad while engaged in commerce between any of the several states or territories,—shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,—for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works,—or other equipment."

A portion of the Federal Safety Appliance Act in effect at the time of this accident relating to secure ladders on railroad cars provides as follows:

"Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions [fol. 222] of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instruction:)

Negligence is the omission to do something which an ordinary prudent person would have done under the circumstances or doing something which such person would have done under the same conditions. It is not absolute or intrinsic but always relates to some circumstances of some time, place or person.

In this case the——

Mr. Hildebrand (interrupting): If Your Honor, please, I think there is a mistake there in the second line of that, "or doing something which such person would not have done." The "not" was apparently omitted and would Your Honor read that over again so that the record may be clear?

The Court: Oh, yes, I see there is a mistake there, "Would not have done."

Mr. Hildebrand: "Would not have done."

The Court: I will read the first portion of that instruction again. Negligence is the omission to do something which an ordinary prudent person would have done under [fol. 223] the circumstances or doing something which such person would not have done under the same conditions. It is not absolute or intrinsic but always relates to some circumstances of some kind, place or person.

In this case the only negligence claimed by plaintiff is an alleged violation of one of the provisions of the Federal Safety Appliance Acts by an interstate carrier. A violation of one of the Federal Safety Appliance Acts by an interstate carrier is in itself negligence and if such violation proximately contributes to the injury to the employee, this violation of the Safety Appliance Act renders the railroad company liable under the Federal Employers' Liability Act as being the result of a "defect or insufficiency, due to its negligence, in its cars, engines, appliances * * * or other equipment," within the meaning of the Federal Employers' Liability Act.

If you find that the plaintiff is entitled to recover, you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages provided to have been sustained by him and proximately caused him by the wrong complained of. And, in

estimating the amount of such damages, you may consider the physical and mental pain suffered, the nature, extent and severity of his injury or injuries, the extent, degree and character of suffering, mental or physical, its dura- [fol. 224] tion and its severity, and the loss of time and value thereof, and the loss of earning capacity.

You may also consider whether the injury was temporary in its nature, or is permanent in its character, and from all these elements, you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages, that is such sum as will compensate him for the injury he sustained.

In order to render a verdict in this case it is not necessary that all of the jurors agree to such verdict. Under the law of this state, in a civil action, it is only necessary that nine jurors agree to such verdict. In this case, therefore, when nine of you jurors agree upon a verdict, such verdict is the verdict of the jury, and it is your duty to return such verdict to the court.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together, and the total is divided by twelve. This is a scheme of chance and no element of [fol. 225] chance may enter into your verdict or into the determination of any question necessary thereto.

In other words, any case where any jury is awarding damages each juror must agree that that is his verdict on any amount that is awarded. This way by—you wouldn't know what amount, if you were to follow that pooling plan or scheme whereby each would write what he thought the plaintiff in the case was entitled and then divide by twelve, you wouldn't know anything about what that amount was going to be, consequently that is a game of chance. You must before you join in any verdict in any case, you must agree that the amount, whatever it is, that that is your opinion of what the party is legally and justly entitled to.

Exception No. 28

Thereupon the court instructed the jury as follows:

I am now reading instructions that have been submitted by the defendant in this action.

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instructions:)

In this case the plaintiff claims to have sustained damages by reason of the negligence of the defendant. The burden is upon plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that [fol. 226] such negligence upon the part of the defendant contributed directly and proximately to the damages sustained. On both these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the defendant and that such negligence directly or proximately contributed to the damages sustained, there can be no recovery herein, and your verdict must be against the plaintiff and in favor of the defendant.

You are instructed that there is a legal presumption that the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, discharged its duties to the plaintiff, and the burden is upon the plaintiff to overcome such presumption by a clear preponderance of the evidence.

You are instructed that by the word "preponderance" is not meant a majority of witnesses, but greater weight, worth or credibility as it appears to you after having heard and seen the witnesses testify for each party to the action. In determining the worth of testimony of any witness, you are entitled to take into account his age, memory, means of knowledge, experience, interest, if any, in the outcome of the suit, and all things by which men judge of their fellows and form opinions of their reliability.

You are instructed that as to the defendant, The Atchison, Topeka and Santa Fe Railway Company, the first ques- [fol. 227] tion for you to consider is whether or not said railway company was guilty of the negligence alleged in the complaint, or any negligence alleged therein, and if you find that the said railway company was not guilty of any of the negligence alleged in the complaint, then at once

you will return a verdict for the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation.

If you find and believe, however, from the preponderance of the evidence that the defendant, The Atchison, Topeka and Santa Fe Railway Company, was guilty of negligence in any of the respects alleged in the complaint, you will then proceed to determine whether or not such negligence so found was the proximate cause of the damages complained of, that is, the efficient cause which was responsible for the plaintiff's damages, if any, resulting therefrom.

If you find the defendant, The Atchison, Topeka and Santa Fe Railway Company was guilty of negligence, but that such negligence was not the proximate cause of the damages to the plaintiff, then you will return a verdict in favor of the defendant, and by your verdict so indicate, because the defendant railway company is not liable in this case even though guilty of negligence unless such negligence was the proximate cause of the damages complained of and sued for herein.

[fol. 228] You are instructed that negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually regulate the conduct of human affairs, would do; or is the doing of something which a prudent and reasonable man would not do; it is not intrinsic or absolute but is always relative to some circumstances of time, place or person. Negligence is of no consequence unless it was the proximate cause of the injury or damage.

The proximate cause of an injury is that cause which in natural or continuous sequence, unbroken by any effective intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

In determining whether an act was the proximate cause of an injury, the question always is whether there was an unbroken connection between the wrongful act and the injury, and to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it ought to have been foreseen in the light of the attending circumstances.

This definition of negligence as it relates to the cause of an action applies alike to the defendant, The Atchison,

[fol. 229] Topeka and Santa Fe Railway Company, and to the plaintiff.

By ordinary care is meant that degree of care which an ordinarily prudent and careful person would have exercised under the circumstances.

The fact of the accident itself raises no presumption whatever of negligence against the defendant. The burden is upon the plaintiff to prove by evidence other than the mere fact of the accident that the defendant was guilty of some one or more of the acts of negligence specified in the complaint and that such acts of negligence on the part of the defendant directly caused or contributed to the injury.

You are instructed that you must not speculate as to whether the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, was negligent with respect to any matters shown in connection with the damages to plaintiff, but such negligence, if any, must be clearly established by the plaintiff by a preponderance of the evidence, and if the evidence leaves the real cause of the damages to plaintiff as a matter of conjecture or doubt, then your verdict should be for the defendant.

This is an action brought by the plaintiff under the provisions of the Act of Congress of April 22nd, 1908, as amended April 5th, 1910, commonly known as the "Federal Employers' Liability Act."

[fol. 230] This federal statute governs the rights, duties and liabilities of common carriers by railroad to their employees for personal injuries, when the injury occurs while the carrier is engaged and the injured servant is employed in interstate commerce or in work so closely related to it as to be practically a part of such interstate transportation. But you are instructed that the responsibility of the railroad carrier under said Federal Employers' Liability Act for injuries to its employees must be proximately caused by negligence. In other words, there can be no recovery unless the railroad carrier has been guilty of an act of negligence proximately causing the accident or injury of which complaint is made.

You are instructed that employers are not to be considered as insurers of their employees against all dangers, but are held under the law, to that degree of care which is referred to in these instructions as "ordinary care"; to furnish them ordinarily safe places in which to work and

ordinarily safe equipment with which to perform their labor.

You are instructed that it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is respon- [fol. 231] sible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show that negligence on the part of the employer caused the injury, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

You are instructed that you should not permit any sympathy for the plaintiff or bias against the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, to influence you in any manner in arriving at your verdict. Your verdict must be based solely on the evidence received and the law as given you in these instructions, and not upon anything you may have otherwise heard or read. You must likewise be uninfluenced by the fact that one of the defendants is a corporation engaged in the operation of a railway as a common carrier of freight and passengers.

The parties to this litigation are entitled to your calm, dispassionate judgment the same as if they were corporations, or were individuals, no more and no less.

[fol. 232] You are instructed that you are not at liberty to disregard testimony merely and solely because the witnesses who gave same are employees of the defendant herein.

You are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses. Your power of judging, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of legal evidence. You are not bound to believe the testimony of any witness unless such testimony imports verity and

establishes conviction in your minds. Nor are you bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds as against a lesser number or against other evidence satisfying your minds. Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case, if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statement he or she makes, by his or her candor and fairness, or lack thereof, and by any other fact or circumstances elicited during the trial which may aid you in determining as to whether a witness has spoken the truth.

You are instructed that you are not to draw any inferences, either favorable or unfavorable, from any objec- [fol. 233] tions made by counsel on either side to the introduction of evidence in this case, nor to any discussion, talk or argument taking place between counsel, or between court and counsel. Such objections, talk and argument are not in evidence in the case and you are not entitled to consider the same or be influenced by it in any manner whatsoever.

The jury had an opportunity this morning of viewing a freight car constructed similarly to the car involved in this case. With reference to your inspection of this car you are instructed that you are not to take into consideration in arriving at your verdict any condition found to exist on this freight car except that it was a car similarly constructed.

You are instructed that if you find the freight car in question was equipped with a secure side ladder and handholds and that it conformed to the standard specifications fixed by the Interstate Commerce Commission, you must return a verdict against the plaintiff and in favor of the defendant.

You are instructed that you are not to infer from anything the court has said while ruling upon objections or making questions of witnesses——

The Court: I think that should be "asking" isn't it? (Reading:) "You are instructed that you are not to infer [fol. 234] from anything the court has said while ruling upon objections or asking questions of witnesses herein that the court has any opinion as to what should or should

not be done in this case. What you are to do is to take the evidence admitted and weigh it with care and apply the law as it is given to you by the court and render a verdict in accordance therewith, and you are not to be influenced one way or the other by anything except the law and the evidence in this case. Where the court has excluded evidence, you are not to consider the same, and when a question was asked by either side and objection made and sustained, you are not to consider in any sense what the answer might have been nor indulge in presumptions against the party objecting.

The fact that you have been instructed upon the measure of damages is not to be taken by you, as an intimation that the court believes the plaintiff is or is not entitled to recover any damages. These instructions are given to you solely to aid you and guide you in finding a verdict in the case in the event the plaintiff is entitled to recover.

If, under the evidence and under these instructions you do not believe the plaintiff is entitled to recover from defendants, then I charge you to return a verdict for said defendants.

[fol. 235] You are instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testifies, by the character of his or her testimony, or by testimony affecting the character of the witness for truth, honesty or integrity of his motives or by contradictory evidence.

A witness false in one part of his or her testimony is to be distrusted in others. If, therefore, you believe that any witness has testified falsely in regard to any fact, not as a result of mistake or inadvertence, but wilfully, and with a design to deceive, you must treat all of his or her testimony with distrust and suspicion, and reject it all unless you shall be convinced that notwithstanding the base character of the witness he or she has in other particulars stated the truth.

(NOTE.—In reading above instruction the court substituted the word "may" for "must" as requested in written instructions.)

You are instructed that, where one predicates liability on the fault of another, he must not only prove the fault relied

upon, but that the injury suffered is traceable to the fault. It is not sufficient to show the fault, but the plaintiff must go further and show that the proven fault was the proximate cause of the injury sustained. Though the fault be proven, yet, if the injury sustained could just as well have resulted from some other cause than the proven fault, or [fol. 236] if the evidence does not so closely connect the injury with the proven fault as to exclude any other reasonable hypothesis than that the injury was the proximate result of the proven fault, then it cannot be said that the plaintiff has proven that the fault relied upon was the proximate cause of his injury. In other words, if any other reasonable conclusion may be drawn from the facts in evidence, as to the cause of the injury, other than the fault relied upon to recover, then the evidence does not support the conclusion that the injury was the result of the fault or negligence charged. Of course, the evidence cannot be said to support the conclusion that the injury was the proximate result of the fault complained of, if the evidence is just as consistent with a theory as to its cause which does not involve the fault charged, or may be traceable to some other fault not charged, or one which does not create liability. The fault must be proven, and the inference drawn from the proven fault must lead the mind to a satisfactory conclusion that the proven fault was the proximate cause of the injury.

You are instructed that during the trial of this case, counsel for the plaintiff in open court abandoned plaintiff's claim for negligence under the Federal Employers' Liability Act other than that connected with the Safety Appliance Act, and announced that plaintiff bases his case [fol. 237] squarely and flatly upon the provisions of the Federal Safety Appliance Act. In view of this announcement by counsel for the plaintiff you are instructed that you, in arriving at your verdict, must not take into consideration any acts of negligence of the defendant in the event that you find the defendant guilty of any negligence other than in connection with the furnishing of the ladder in question. Any negligence in this case, other than that connected with furnishing the ladder in question, therefore, if any negligence there be, becomes wholly immaterial and must not be considered by you for any purpose whatever.

In other words, the plaintiff in this case bases his case squarely upon the Safety Appliance Act and his claim is that the ladder in question was not reasonably safe and secure and that by not supplying a reasonably safe and secure ladder, that the defendant was negligent. That's the claim here of the plaintiff.

You are instructed that it is the duty of one who has sustained personal injuries, which he alleges were caused through some breach of duty by another, to do all that he reasonably can to minimize the damages. If the injuries sustained prevent him from again pursuing his usual work, but permit him to do lighter work and work of a different character, he is required, under the law, if his physical [fol. 238] condition will permit him to do lighter work and work of a different character, and if he is qualified to perform such work, to make reasonable effort to procure such work.

Exception No. 29

Thereupon the court instructed the jury as follows:

Ladies and gentlemen of the jury, we have concluded the reading of the instructions that have been submitted to the court. I again wish to impress upon you the fact that you are the sole and exclusive judges of the facts in this case. The court has nothing to do with deciding whether or not the ladder in question was or was not safe or secure or whether or not it is by reason of this brace rod that caused the plaintiff to fall from the ladder or as to what damages the plaintiff has suffered in this action.

To the giving of the above instruction the defendant then and there duly excepted.

(Continuing the court's instructions:)

These are questions solely for your consideration and it is your duty to decide them intelligently and fairly without prejudice or sympathy or bias either one way or the other and to arrive at a verdict which is both true in law and in fact. Now I wish to say to those of you who may not have had much experience on juries, or perhaps none, [fol. 239] that when you retire to the jury room you should not enter the jury room with a fixed conviction without—and not having your mind in such condition that you can

listen respectfully to the views of your fellow jurors. The law contemplates that every individual on a jury counts, that their judgment is important and every juror in a case should express his or her convictions in regard to the facts in the case and you should listen, all of you should listen to the views of the others with the same attention and with the same respect that you would expect others to give your views under the circumstances.

Exception No. 30

Thereupon the court instructed the jury as follows:

Now I think we have covered everything and we have prepared two forms of verdict here, only one of which you will use. In other words, one form that you find in favor of the defendant and the other is that you find in favor of the plaintiff. It is all filled out excepting the amount of damages that you would award and then you sign it by your foreman and return into court.

To the giving of the above instruction the defendant then and there duly excepted.

[fol. 240] (Continuing the court's instructions:)

The case is now submitted to you and you will retire with the bailiffs to the jury room.

Exception No. 31

Thereafter the jury returned and asked further instructions of the court, and the following proceedings were had:

The Court: Ladies and gentlemen of the jury: The bailiff informs me that there is some matter you wish to take up with the court. Would the foreman please tell me what it is?

The Foreman (Mr. Luiz): Your Honor, as foreman of the jury I have been asked to have you read that part of the Interstate Commerce ruling in regard to the space of a ladder on the—(to juror): Mr. Smith, please, you ask the question.

Juror (Mr. Smith): Yes. Judge, what we want, what I would like to find out is that if we are to consider the ladder mentioned, the safety ladder mentioned in the Interstate Commerce report.

The Court: I don't understand.

Juror (Mr. Smith): Are we to take into consideration the ladder as safety ladder under the dimensions that are specified by the Railroad Commission—Interstate Commerce Commission? Can we ignore that in our debates? Does it play any part in this case?

[fol. 241] The Court: Well, the court instructs you of its own motion as follows: The law provides that a secure ladder must be provided. There is no law that covers everything connected with what we may term a safe ladder. However, there are certain specifications provided by the Interstate Commerce Commission, one of them, to-wit: is that there must be a two-inch, if I remember correctly, two or two and one-half inch clearance. Anything—that is one of the provisions that *they* they say that a ladder must contain but there is nothing in the law or that nothing in the Interstate Commerce Act that states that a ladder with a two and one-half inch clearance is safe. Now any provision or any condition imposed by the Interstate Commerce Commission, a compliance with that you could not—if that was complied with, you couldn't raise the question of negligence because they have to follow that particular rule. Now does that answer the question?

To the giving of the above instruction the defendant then and there duly excepted.

(Court's instructions continuing:)

Exception No. 32

Thereupon the court instructed the jury as follows:

In other words, human foresight and ingenuity could not anticipate everything that might arise in determining [fol. 242] whether or not anything was safe but among other things—the Interstate Commerce Commission provides that rungs shall be so far apart and also that there must be a clearance back of the rungs of two inches but there is nothing in that law which specifies that a rung that has that clearance is a safe ladder. What is a safe ladder is for you to determine from all the evidence in this case. Now does that answer the question?

To the giving of the above instruction the defendant then and there duly excepted.

Exception No. 33

Thereupon the jury asked further instructions of the court, and the following proceedings were had:

Juror (Mr. Smith): I think it does. It satisfies me.

The Jurors: Yes.

The Court: Retire with the bailiff.

Juror (Mr. Luiz): Your Honor, there is another question they asked me to ask the court here and that is if we could have the Anderson claim reports.

The Court: Those reports, those are in evidence. Anything that is in evidence you have a right to have. Mr. Clerk, would you please give those two exhibits to the jury? I don't recall the number of them but you will recognize [fol. 243] them when you see them.

Mr. Lockwood: Why not give them all the exhibits?

Mr. Hildebrand: No objection to that.

The Foreman (Mr. Luiz): There was something said if we could have also the blueprint?

The Court: Certainly. Anything that is in evidence you are entitled to take them into the jury room.

Mr. Lockwood: I will ask the court to give them all the exhibits if you will.

The Court: All right. Now there is one other instructions that we usually give to juries which I failed to give them. The law contemplates that if reasonably possible jurors shall agree upon a verdict but each party to a case is entitled to the judgment of every juror and you are justified in retaining your conscientious and honest convictions until you are satisfied that you are mistaken. No juror should change his opinion for the sole reason that he is outnumbered. That won't justify changing your opinion. It is your duty to reason with your fellow jurors and try and arrive at a verdict if you can do so but no juror is authorized to surrender his honest conviction simply by reason of the fact that he may be outnumbered in the jury room. Is that all clear?

[fol. 244] The Foreman (Mr. Luiz): Another thing, Your Honor, that I think would be probably a good thing to read over again would be that instruction probably that Safety Appliance Act. We would like to have that read over again if it is possible.

Juror (Mr. Smith): That is, are the last report, judge, along toward the latter end.

The Court: Well now, there is two or three.

Juror (Mr. Smith): Well now, this is on the last, along towards the finish.

The Court: Well now, of course, that is a little difficult for me to just pick out what you want but I tell you, I will read what the act itself says about safety.

It shall be unlawful for any common carrier subject to the provisions of this chapter to haul or permit to be hauled or used on its line any car, subject to the provisions of this chapter, not equipped with appliances herein provided for, to-wit: all cars must be equipped with secure sill steps and efficient hand brakes. All cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the top of such ladders provided that where there is a double car certain things may be omitted. Now is that the section that you want?

[fol. 245] Juror (Mr. Smith): No, that isn't the one. It was on the last report, you read along towards the latter part.

The Court: Well, is that the one in regard to if this car was equipped——

Juror (Mr. Smith): I think it pertains to the Safety Appliance Act if I remember right.

Mr. Lockwood: I think I know the one referred to if I may approach the bench.

Mr. Hildebrand: I haven't any objection to reading all the provisions of the Safety Appliance Act.

The Court: If we can find what the jury wants——

Mr. Lockwood: I think I can assist Your Honor if I may approach the bench.

Juror (Mr. Smith): It is the last one.

The Court: I don't understand.

Mr. Lockwood: I think I may assist Your Honor in finding the one.

The Court: I think that is one of the last ones that you gave me. Just show that to Mr. Hildebrand.

Mr. Lockwood: He hasn't his copy here, Your Honor.

The Court: Now, gentlemen, I think perhaps this is the instruction. Mr. Hildebrand, you might look at that and Mr. Lockwood, but I think that is the instruction probably that they have in mind.

[fol. 246] (Counsel examine instructions.)

Mr. Lockwood: That is the one I had in mind, Your Honor.

Mr. Hildebrand: I don't think it is. It doesn't mention the Safety Appliance Act at all.

Mr. Lockwood: That is the one I think the juror means.

Juror (Mr. Smith): I won't say that it is the Safety Appliance Act but it pertains to this.

Mr. Hildebrand: I haven't any objection to reading all the provisions of the Safety Appliance Act if that is what the juror wants but I don't think that something else should be read unless the request is made for it.

Mr. Lockwood: That is, as I recall, is the only one near the latter part of the instructions that bears on that.

Juror (Mrs. Kramer): Is it out of order for me to talk?

The Court: What?

Juror (Mrs. Kramer): Is it out of order for me to talk?

The Court: It is always in order for a juror to ask questions.

Juror (Mrs. Kramer): The question that was in our mind when we were in the jury room was clearly answered by Your Honor just when we first came in. Isn't that what you meant, Mr. Smith?

[fol. 247] Juror (Mr. Smith): Yes, but it isn't exactly the words as I remember it, of the latter part of one of the last reports.

Juror (Mrs. Kramer): Well, the question in our mind was to what extent should we consider the specifications set forth by the Railroad Commission and you instructed us on that. That's what brought us in here, that discussion.

The Court: Now I think this is what Mr. Smith has in mind. He says it was in the last instructions I gave him.

Juror (Mr. Smith): Yes.

The Court: You are instructed that if you find the freight car in question was equipped with a secure side ladder and hand-holds and that it conformed to the standard specifications fixed by the Interstate Commerce Commission you must return a verdict against the plaintiff and in favor of the defendant. Is that the one?

Juror (Mr. Smith): That's the one.

The Court: Well now I will read that again: "You are instructed that if you find the freight car in question was equipped with a secure side ladder and secure hand-holds

and that it conformed with the specifications decided—prescribed by the Interstate Commerce Commission that you must find for the defendant.

To the giving of the above instructions the defendant then and there duly excepted.

[fol. 248] (Court's instructions continuing:)

Exception No. 34

Thereupon the court further instructed the jury as follows:

Juror (Mr. Smith): That's the part.

The Court: That's the one? Well now you have in mind that whole instruction, have you?

Juror (Mr. Smith): Clear enough.

The Court: Now you are instructed that if you find the freight car in question was equipped with a secure side ladder—now, of course, that's really the question that is before you—was that ladder, was it secure? Now is there anything further, ladies and gentlemen?

Juror (Mrs. Armand): Don't you feel, Your Honor, that your first instruction that you gave us when we returned in here just now is an answer to that question? You see the bearing of the two? In other words, the question that was in Mr. Smith's mind in regard to the instruction which you just read was really the thing that brought about the question that we asked you when we first came in. In other words, he had two questions on his mind but he gave you two bases for the same question, you understand?

The Court: I think I understand the difficulty.

Juror (Mr. Smith): That is all explained.

[fol. 249] The Court: But I again instruct you that one of the principal issues in this case is whether or not the ladder in question was secure, safe ladder and that is a question of fact and that is a question for you to determine.

To the giving of the above instruction the defendant then and there duly excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

Exception No. 35

You are instructed that during the trial of this case, counsel for the plaintiff in open court abandoned plaintiff's claim for negligence under the Federal Employer's Liability Act and announced that plaintiff bases his case squarely and flatly upon the provisions of the Federal Safety Appliance Act. In view of this announcement by counsel for the plaintiff, you are instructed that you, in arriving at your verdict, must not take into consideration any acts of negligence of the defendant in the event that you find the defendant guilty of any negligence. Any negligence in the case, therefore, if any negligence there be, becomes wholly immaterial and must not be considered by you for any purpose whatever.

[fol. 250] Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 36

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed to return a verdict in favor of the defendant, The Atchison, Topeka and Santa Fe Railway Company.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 37

Thereupon the defendant requested the court to instruct the jury as follows:

When the plaintiff entered into defendant's employment as a brakeman, he is presumed to have known and taken upon himself the risks and dangers incident to such work.

His assumption of obvious and necessary risks was, in [fol. 251] the nature of things, part of his employment. It follows, therefore, that the defendant violated no legal duty to him in failing to protect him from dangers incident to his work. An employee who takes upon himself an occupation that is dangerous in its character assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated by him, or when so obvious that an ordinarily careful and prudent person would, under the circumstances, have observed and appreciated them, the extraordinary risks and those due to negligence of his employer and fellow employees.

In other words the employee assumes the risks due to the negligence of his employer when those risks are obvious and known to the employee, or so obvious that an ordinarily careful and prudent man would, under the circumstances, have observed and appreciated them, and not only does the employee assume such risks, but also he assumes the risks of conditions that are fully known to him, or are so obvious that an ordinarily careful and prudent man would, under the circumstances, have observed and appreciated them.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

[fol. 252] (Defendant's requested instructions continuing:)

Exception No. 38

Thereupon the defendant requested the court to instruct the jury as follows:

If you find from the preponderance of the evidence that the plaintiff was injured and you further find that such injury resulted because of risks incident to plaintiff's employment, or risks caused by defendant's negligence, which were obvious or fully known and appreciated by plaintiff, The Act of Congress, approved April 27th, 1908, and Acts amendatory thereto, commonly known as the Federal Employers' Liability Act, permits this defense of assumption of risk and you should find for the defendant.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 39

Thereupon the defendant requested the court to instruct the jury as follows:

Quite apart from the question of assumption of risk, concerning which you have been instructed, you are further instructed that if you find from a preponderance of the [fol. 253] evidence that the plaintiff was guilty of negligence in any wise contributing to his accident and injury, then, under the Federal Employers' Liability Act, upon which this suit is predicated, you are required to diminish the damages, if any, to which you may find the plaintiff entitled, in proportion to the amount of negligence attributable to the plaintiff.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 40

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that an employee is not in the exercise of ordinary care unless at each step of his work he makes the ordinary and effective use of his bodily and mental faculties and observes as attentively as is ordinarily and reasonably proper under the circumstances, the condition and position of the instrumentalities by which his safety may be affected, and the results of his work with or about such instrumentalities, insofar as such work may tend to subject him to danger from accident or injury.

[fol. 254] Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 41

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that legislation for the safety equipment of railroad cars used by interstate carriers is within

the Interstate Commerce Commission's power to regulate interstate commerce. The number, dimensions, location and manner of application of side-ladders or grab-irons on freight cars are designated and controlled by the Interstate Commerce Commission in accordance with Federal laws. The number, dimensions, location and manner of application of the same, as fixed and designated by the Interstate Commerce Commission, are designated, under such Federal laws, as the standards of equipment to be used on all freight cars. These Federal laws provide that the Interstate Commerce Commission may not only fix and designate the number, dimensions, location and manner of the application of these appliances, but is given further authority, after hearing, to modify or change the same, and fix a time within which such modification or change shall become effective [fol. 255] and obligatory. It is mandatory upon the carrier to conform to the standards thus fixed by the Interstate Commerce Commission.

It is the duty of the Interstate Commerce Commission not merely to inspect but to prescribe the rules and regulations for which fitness for service shall be determined. Unless these rules and regulations are complied with the equipment is not in proper condition for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. When the side-ladders or grab-irons, or any other of the equipment designated under the Federal Safety Appliance Act, meet the tests and rules fixed by the Commission, it must, so far as carriers of interstate commerce are concerned, be esteemed proper and safe.

Which said instruction the court refused to give and to which ruling the defendant the and there duly excepted.

Exception No. 42

Thereupon the defendant requested the court to instruct the jury as follows:

You are further instructed that, in accordance with the power vested in the Interstate Commerce Commission, and the Commission's duty in respect thereto, hearings were held to determine the number, dimension, location and manner of application of side-ladders and hand-holds on freight [fol. 256] cars, and other appliances covered by the Federal Safety Appliance Act, and at said hearings it was determined and decided and then and there ordered by the Inter-

state Commerce Commission that the minimum clearance of ladder treads on box and other house cars should be two (2) preferably two and one-half (2½) inches.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 43

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that if you find from the evidence that the plaintiff in this case was guilty of negligence and that such negligence was the sole proximate cause of his injuries, then he cannot recover in this action, and you must find in favor of the defendant.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

[fol. 257] (Defendant's requested instructions continuing:)

Exception No. 44

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that there has been received in evidence Defendant's Exhibits No. One and No. Two, which said exhibits were written statements signed by the plaintiff on September 2nd, 1931, and March 14th, 1932, respectively.

You are instructed that there is a disputable presumption that private transactions have been fair and regular and that in their business relations all persons are presumed to act honestly and in good faith. You are instructed that these statements are competent evidence in the case as to the existence of facts to which they relate; that the plaintiff, when he signed the said statements, was presumed to know the contents thereof and that the contents thereof were presumed to be true. A written statement executed by the person by whom it purports to have been made cannot be condemned as false and fraudulent except on clear and satisfactory evidence.

Your are further instructed that greater credit may be given to either the sworn or the unsworn statements of a

person when made near to the time of the fact under investigation than to his contrary testimony at a much later time.

[fol. 258] Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 45

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that oral testimony in contradiction of the plain terms of a written instrument, or of written admissions, should be clear, full and precise, and that the weight to be given to any such testimony diminishes with its distance from the date of the instrument which it purports to contradict or overcome.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

(Defendant's requested instructions continuing:)

Exception No. 46

Thereupon the defendant requested the court to instruct the jury as follows:

You are instructed that whenever a party has by his own declaration, act or omission intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of [fol. 259] such declaration, act or omission be permitted to falsify it.

Which said instruction the court refused to give and to which ruling the defendant then and there duly excepted.

VERDICT

On the 26th day of September, 1933, the jury having retired to consider their verdict, returned into court and delivered and rendered a verdict in favor of the plaintiff and against the defendant in the sum of $18,000.00, and on the

27th day of September, 1933, judgment was duly entered and recorded thereon in book 41, page 92, of the official records of the clerk of said court.

Exception No. 47

Thereafter the following proceedings were had:

On the 2nd day of October, 1933, defendant duly served and filed its notice of intention to move for a new trial, as follows:

NOTICE OF MOTION FOR NEW TRIAL

"To William W. Scarlett, plaintiff, and to Messrs. Werner, Martin and Hildebrand, his attorneys:

You and each of you are hereby notified that the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, intends to move and does hereby give notice of its intention to move the above entitled court to [fol. 260] vacate and set aside the decision and verdict of the jury and judgment entered thereon, and to grant the defendant a new trial of the above entitled action upon the following grounds and each of them:

1. Irregularity in the proceedings of the court, by which defendant was prevented from having a fair trial.

2. Irregularity in the proceedings of the jury.

3. Irregularity on the part of the plaintiff.

4. Misconduct of the jury.

5. Accident and surprise which ordinary prudence could not have guarded against.

6. Newly discovered evidence, material for the defendant, which defendant could not, with reasonable diligence, have discovered and produced at the trial.

7. Excessive damages, appearing to have been given under the influence of passion and prejudice.

8. Insufficiency of the evidence to justify the verdict.

9. That the verdict is against the law.

10. Errors in law occurring at the trial and excepted to by the defendant.

[fol. 261] 11. Orders of and by the court by which defendant was prevented from having a fair trial.

12. Abuse of discretion of and by the court by which defendant was prevented from having a fair trial.

Said motion will be made upon the minutes of the court, pleadings, papers and files herein and upon this notice of motion and affidavits to be served hereafter, and upon the law relative thereto.

Dated October 2nd, 1933.

Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation."

ORDER DENYING MOTION FOR NEW TRIAL

Thereafter, to-wit, the 23rd day of October, 1933, defendant having presented its motion for a new trial to the court on each of the grounds named in defendant's notice of intention to move for a new trial upon the minutes of the court, the pleadings, papers, records and files herein and the court denied defendant's said motion for a new trial, to which ruling of the court the defendant then and there duly excepted.

[fol. 262] SPECIFICATIONS OF ERRORS IN LAW OCCURRING AT THE TRIAL AND EXCEPTED TO BY THE DEFENDANT

Defendant hereby specifies the following errors in law occurring in the trial upon which it will rely for a reversal of the judgment and ordered appealed from.

1. The court erred in receiving in evidence Plaintiff's Exhibit No. 2. Exception No. 1, page 6.

2. The court erred in receiving in evidence Plaintiff's Exhibit No. 3. Exception No. 2, page 7.

3. The court erred in permitting the plaintiff, over defendant's objection, to testify that he had been discharged by the defendant. Exception No. 3, page 12.

4. The court erred in permitting plaintiff to testify, over defendant's objection, that railroads refused to employ men beyond 35 years of age. Exception No. 4, page 20.

5. The court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence and after plaintiff had rested. Exception No. 5, page 22.

6. The court erred in instructing the jury, over defendant's objection, during the progress of the trial and while evidence was being taken, in the following manner:

[fol. 263] "The Court: 'I wish to instruct the jury and state to the jury that all cars requiring secure ladders shall be equipped with such ladders and running boards. Now there is nothing in the act here that states what a secure ladder is and that is a question of fact that is at issue in this case, is a secure ladder. What is a secure ladder? With that the court has nothing whatever to do. That is a question of fact. Proceed.'" Exception No. 6, page 30.

7. The court erred in instructing the jury over defendant's objection, during the progress of the trial and while evidence was being taken, in the following manner:

"The Court: 'Ladies and Gentlemen of the Jury: The law does not allow the judge in any case being tried by a jury to intimate in any way what the facts are in any case or what credit you should give to the testimony of any witnesses in the case or to express any opinion that would tend to influence the jury in any way in arriving at a question of facts other than legal instruction. However, it is the duty of the court and it is also the duty of attorneys on both sides to present a case in such a manner that the jurors can arrive at a legal, conscientious and intelligent verdict. Now, I wish to direct your attention, at this time, this case seems to be—to take considerable time and there is a lot of evidence and there are quite a few issues of fact [fol. 264] involved and quite a few issues of law that it wouldn't be surprising that men and women from the ordinary affairs of life might get or might not get a little confused with all the issues.

Now you will keep in mind that there are at least two quite prominent issues in this case—we will not say how many there—but there are two that are quite prominent, that is this: The plaintiff claims that this brace rod or stay rod or whatever you may call it, in the manner in which it was constructed was negligent, which, of course, I have got nothing to do with that, and I am not expressing any opinion in any way about it, whether it was reason-

ably safe or was not reasonably safe. That is a matter that entirely rests with you. I have got nothing to do with that, but, however, what I want to call your attention to; the mere issue, the plaintiff alleges that this was unsafe—he also alleges that it was this unsafe—which he alleges to be an unsafe contrivance that caused him to fall off the train. Now, those are distinct propositions and the burden of proving them both is upon the plaintiff. For instance, as far as you are concerned in this case, if it was not this rod that caused the man to fall it wouldn't make any difference whether or not it was negligence in maintaining that. It is up to the plaintiff in this action to establish those two propositions, because if the rod had nothing to [fol. 265] do with his falling off the train, why, it doesn't make any difference whether maintenance of the rod, so far as this case is concerned, was negligent or was not negligent, so you will please keep that in mind, that there are two distinct propositions there. We will take a recess until one—by the way—what about that question of law we were discussing about that question of the pleadings?'" Exception No. 7, page 50.

8. The court erred in denying the following motion of the defendant:

"Mr. Lockwood: 'Comes now the defendant, after the plaintiff in the presence of the court and jury has abandoned his action under the Federal Employers' Liability Act, and moves the court to direct a verdict in favor of the defendant and against the plaintiff at this time and to dismiss the jury because there is no issue now in this case under the Federal Safety Appliance Acts, or any of them, that no issue has been tendered or joined as to any violation of the Federal Safety Appliance Acts, or any of them, and since the abandonment by the plaintiff, in the presence of the court and jury, of his action under the Federal Employers' Liability Act there is now no issue before this court and jury. Now let me say, Your Honor, that if there is to be a discussion of this matter, it being a purely legal matter, it should not be in the presence of the jury.'" Exception No. 8, page 64.

[fol. 266] 9. The court erred in sustaining plaintiff's objection to evidence offered by the defendant as specifically set forth on pages 75 to 78, inclusive, hereof. Exception No. 9, page 75.

10. The court erred in sustaining plaintiff's objection to evidence offered by the defendant as specifically set forth on pages 78 to 81, inclusive, hereof. Exception No. 10, page 78.

11. The court erred in sustaining plaintiff's objection to evidence offered by the defendant as specifically set forth on pages 81 to 83, inclusive, hereof. Exception No. 11, page 81.

12. The court erred in sustaining plaintiff's objection to evidence offered by the defendant as specifically set forth on pages 83 and 84, inclusive, hereof. Exception No. 12, page 83.

13. The court erred in admonishing the jury during the progress of the trial and while evidence was being taken, over the objection of defendant, as follows:

"The Court: 'I understand, ladies and gentlemen of the jury, that one of the issues in this case as to whether or not that ladder was a secure and a secure ladder means; one that is reasonably safe for those who have to have occasion to use it. Proceed, gentlemen.'" Exception No. 13, page 85.

[fol. 267] 14. The court erred in stating in the presence of the jury, over defendant's objection, the following:

"The Court: 'Now, Mr. Parks, Mr. Lockwood asked you whether or not in your opinion as a trainman whether or not that was a secure ladder and now what did you mean by that, Mr. Parks, because—I am asking you that because lawyers and courts have somewhat—have different meanings for that. Now under the law applicable to this case, a secure ladder means one that's reasonably safe to be used by those trainmen who have occasion at all times to use it. It doesn't mean that it has got to be securely screwed or bolted to the car. "Securely" means reasonably safe for use by those who have occasion to use it. Is that what you meant?'" Exception No. 14, page 85.

15. The court erred in permitting the witness Parks, over defendant's objection, to answer the following question:

"Mr. Hildebrand: 'Have you observed as to whether any considerable number of these cars have the brace rods

worn shiny right back of where the rod crosses the rung of the ladder?'" Exception No. 15, page 86.

16. The court erred in permitting counsel for the plaintiff, over the objection of defendant, to interrogate the [fol. 268] witness Parks as to whether after the accident he had a telephone conversation with plaintiff in which it was claimed that he stated that he (Parks) nearly fell off one of the same class of cars due to his foot having struck the rod. Exception No. 16, page 88.

17. The court erred in permitting the introduction of evidence as to a telephone conversation between Conductor Parks and the plaintiff relative to Conductor Parks having nearly fallen off one of the same class of cars. Exception No. 17, page 92.

18. The court erred in stating in the presence of the jury, over defendant's objection, the following:

"The Court: 'No, but gentlemen, are we not getting tangled up here a little? Now as I understand it, this particular section relied on by Mr. Hildebrand, who appears for the plaintiff in this action, is a law of the United States. The Interstate Commerce Commission has got nothing to do with that. However, they can make certain designations, for instance they can say that the rungs on the ladder must be a certain kind of steel and a certain size. But the statute itself says that ladders used by brakemen on freight trains must be secure ladder. They don't say what will be a secure ladder. That is the question that is left to the jury. Now the Interstate Commerce Commission can't—they will say, "here, the ladder has got to be—the [fol. 269] rungs so far apart, the rungs so thick," perhaps one thousand and one things that they could specify but still it would remain for the jury to determine whether or not this matter furnished is a safe ladder. Of course, there is this protection to the railroad that any order that the Interstate Commerce Commission makes, you can't predicate negligence on a compliance with that order, whether they are right or wrong.'" Exception No. 18, page 96.

19. The court erred in permitting plaintiff's witness Emery E. Smith to testify, over defendant's objection, that the rod in question was unsafe, all as more particu-

larly set forth on pages 113 to 117, inclusive, hereof. Exception No. 19, page 113.

20. The court erred in permitting the plaintiff to testify, over defendant's objection, that he was trying to effect a friendly settlement with the defendant prior to the filing of a lawsuit. Exception No. 20, page 123.

21. The court erred in denying defendant's motion for a directed verdict at the close of all of the evidence and after both sides rested, all as specifically set forth on pages 124 to 126, inclusive, hereof. Exception No. 21, page 124.

22. The court erred in giving to the jury the instruction set forth in Exception 22, pages 126 to 128, inclusive, hereof. Exception No. 22, page 126.

[fol. 270] 23. The court erred in giving to the jury the instruction set forth in Exception No. 23, on page 128 hereof. Exception No. 23, page 128.

24. The court erred in giving to the jury the instruction set forth in Exception No. 24 on page 132 hereof.

25. The court erred in giving to the jury the instruction set forth in Exception No. 25 on pages 132 and 133 hereof.

26. The court erred in giving to the jury the instruction set forth in Exception No. 26 on page 134 hereof.

27. The court erred in giving to the jury the instruction set forth in Exception No. 27 on pages 134 to 135 hereof.

28. The court erred in giving to the jury the instruction set forth in Exception No. 28 on page 137 hereof.

29. The court erred in giving to the jury the instruction set forth in Exception No. 29 on pages 146 and 147 hereof.

30. The court erred in giving to the jury the instruction set forth in Exception No. 30 on pages 147 and 148 hereof.

31. The court erred in giving to the jury the instruction set forth in Exception No. 31 on pages 148 and 149 hereof.

[fol. 271] 32. The court erred in giving to the jury the instruction set forth in Exception No. 32 on page 149 hereof.

33. The court erred in giving to the jury the instruction set forth in Exception No. 33 on pages 149 to 153, inclusive, hereof.

34. The court erred in giving to the jury the instruction set forth in Exception No. 34 on pages 153 and 154 hereof.

35. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 35 on pages 154 and 155 hereof.

36. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 36 on page 155 hereof.

37. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 37 on pages 155 and 156 hereof.

38. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 38 on page 156 hereof.

39. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 39 on pages 156 and 157 hereof.

[fol. 272] 40. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 40 on page 157 hereof.

41. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 41 on pages 157 and 158 hereof.

42. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 42 on pages 158 and 159 hereof.

43. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 43 on page 159 hereof.

44. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 44 on pages 159 and 160 hereof.

45. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 45 on page 160 hereof.

46. The court erred in refusing to give the jury defendant's requested instruction included in Exception No. 46 on pages 160 and 161 hereof.

47. The court erred in denying defendant's motion for a new trial, set forth in Exception No. 47, on pages 161 and 162 hereof.

[fol. 273] THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT OF THE JURY IN THE FOLLOWING PARTICULARS

First. The evidence is insufficient to justify the finding of the jury that the defendant maintained a safety appliance defect.

Second. The evidence is insufficient to justify the finding of the jury that the diagonal brace rod that was attached to the freight car beneath the side ladder and between the side ladder and the side of the freight car, constituted a safety appliance defect.

Third. The evidence is insufficient to justify the finding of the jury that the side ladder upon the freight car involved in the accident was insecure.

Fourth. The evidence is insufficient to justify the finding of the jury that the side ladder upon the freight car involved in the accident was unsafe.

Fifth. The evidence is insufficient to justify the finding of the jury that the plaintiff was damaged in the sum of eighteen thousand dollars ($18,000).

[fol. 274] SPECIFICATIONS OF PARTICULARS IN WHICH THE VERDICT OF THE JURY WAS AND IS AGAINST THE LAW

The verdict was and is against the law in each and every particular hereinbefore specified in Exceptions 1 to 47, inclusive, and in each and every particular wherein it is claimed the evidence was and is insufficient to justify the verdict of the jury, and the defendant further specifies the following particulars in which the verdict was and is against the law:

1. The verdict was and is against the law in that it appears from the undisputed evidence in the case that there was no violation of the act of Congress known as the Safety Appliance Act that proximately caused or contributed to the plaintiff's injuries.

2. The verdict was and is against the law in that it appears from the undisputed evidence in the case that the side ladder on the car involved in the accident was constructed in each and every particular in accordance with the rules and specifications promulgated by the Interstate Commerce Commission and then in force.

3. The verdict was and is against the law in that it appears from the undisputed evidence in the case that the side ladder on the car involved in the accident was constructed and maintained strictly in accordance with the [fol. 275] plans, specifications and rules of the Interstate Commerce Commission then in force. Hence, the jury should not have been permitted to speculate as to whether the side ladder involved was "secure."

4. The verdict was and is against the law because the jury ignored and failed to observe and comply with the following instruction of the court:

"You are instructed that, where one predicates liability on the fault of another, he must not only prove the fault relied upon, but that the injury suffered is traceable to the fault. It is not sufficient to show the fault, but the plaintiff must go further and show that the proven fault was the proximate cause of the injury sustained. Though the fault be proven, yet, if the injury sustained could just as well have resulted from some other cause than the proven fault, or if the evidence does not so closely connect the injury with the proven fault as to exclude any other reasonable hypothesis than that the injury was the proximate result of the proven fault, then it cannot be said that the plaintiff has proven that the fault relied upon was the proximate cause of his injury. In other words, if any other reasonable conclusion may be drawn from the facts in evidence, as to the cause of the injury, other than the fault relied upon to recover, then the evidence does not support the conclusion that the injury was [fol. 276] the result of the fault or negligence charged. Of course, the evidence cannot be said to support the conclusion that the injury was the proximate result of the fault complained of, if the evidence is just as consistent with a theory as to its cause which does not involve the fault charged, or may be traceable to some other fault not

charged, or one which does not create liability. The fault must be proven, and the inference drawn from the proven fault must lead the mind to a satisfactory conclusion that the proven fault was the proximate cause of the injury." (Pages 144 and 145 hereof.)

5. The verdict was and is against the law because the jury ignored and failed to observe and comply with the following instruction of the court:

"You are instructed that during the trial of this case counsel for the plaintiff in open court abandoned plaintiff's claim for negligence under the Federal Employers' Liability Act other than that connected with the Safety Appliance Act, and announced that plaintiff bases his case squarely and flatly upon the provisions of the Federal Safety Applicance Act. In view of this announcement by counsel for the plaintiff, you are instructed that you, in arriving at your verdict, must not take into consideration any acts of negligence of the defendant in the event that you find the defendant guilty of any negligence other than in connection with the furnishing of the ladder [fol. 277] in question. Any negligence in this case, other than that connected with furnishing the ladder in question, therefore, if any negligence there be, becomes wholly immaterial and must not be considered by you for any purpose whatever.

"In other words, the plaintiff in this case bases his case squarely upon the Safety Applicance Act and his claim is that the ladder in question was not reasonably safe and secure and that by not supplying a reasonably safe and secure ladder that the defendant was negligent. That's the claim here of the plaintiff." (Pages 145 and 146 hereof.)

6. The verdict was and is against the law because the jury ignored and failed to observe and comply with the following instruction of the court:

"You are instructed that if you find the freight car in question was equipped with a secure side ladder and handholds and that it conformed to the standard specifications fixed by the Interstate Commerce Commission, you must return a verdict against the plaintiff and in favor of the defendant." (Page 143 hereof.)

7. The verdict was and is against the law because the jury ignored and failed to observe and comply with the following instruction of the court:

[fol. 278] "You are instructed that it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show that negligence on the part of the employer caused the injury, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." (Page 141 hereof.)

8. The verdict was and is against the law because the jury ignored and failed to observe and comply with the following instruction of the court:

"In this case the only negligence claimed by plaintiff is an alleged violation of one of the provisions of the Federal Safety Applicance Act. A violation of one of the Federal Safety Appliance Acts by an interstate carrier is in itself [fol. 279] negligence and if such violation proximately contributes to the injury to the employee, this violation of the Safety Appliance Act renders the railroad company liable under the Federal Employers' Liability Act as being the result of a 'defect or insufficiency, due to its negligence, in its cars, engines, appliances or other equipment,' within the meaning of the Federal Employers' Liability Act." (Pages 135 and 136 hereof.)

RECITAL AS TO EXHIBITS

The following exhibits were offered in evidence by the plaintiff and were received in evidence and marked

"Plaintiff's Exhibit No. 2,"

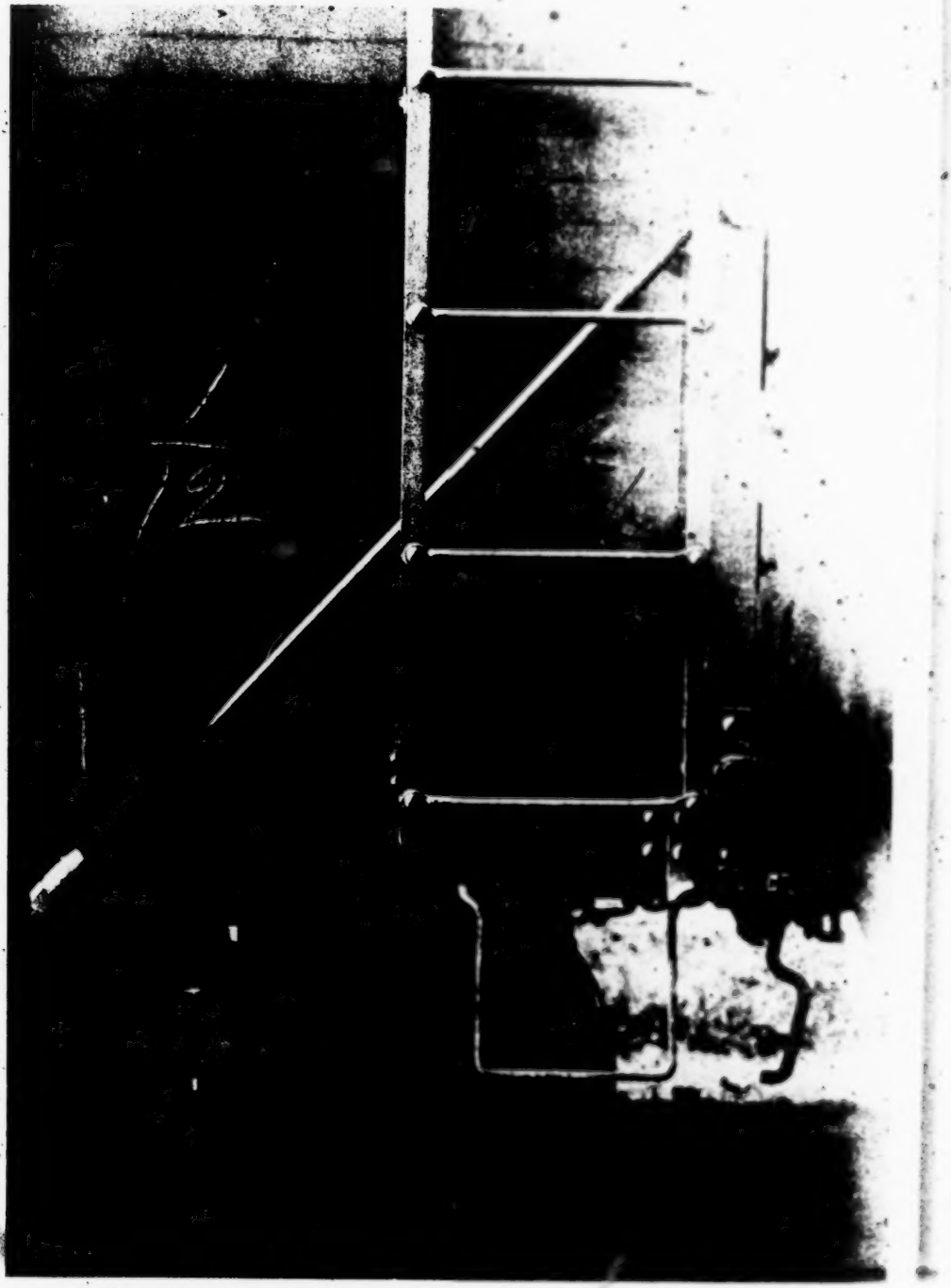
"Plaintiff's Exhibit No. 3,"

"Plaintiff's Exhibit No. 4,"
"Plaintiff's Exhibit No. 5,"
"Plaintiff's Exhibit No. 6,"
"Plaintiff's Exhibit No. 7."

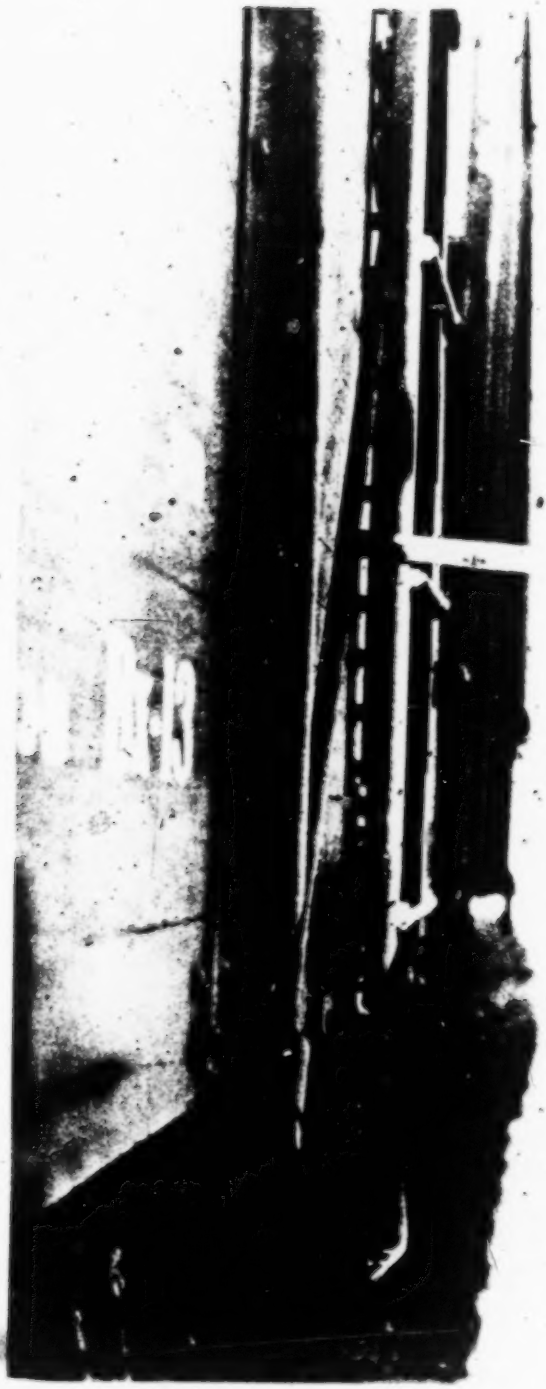
[fol. 280] (Photostats)

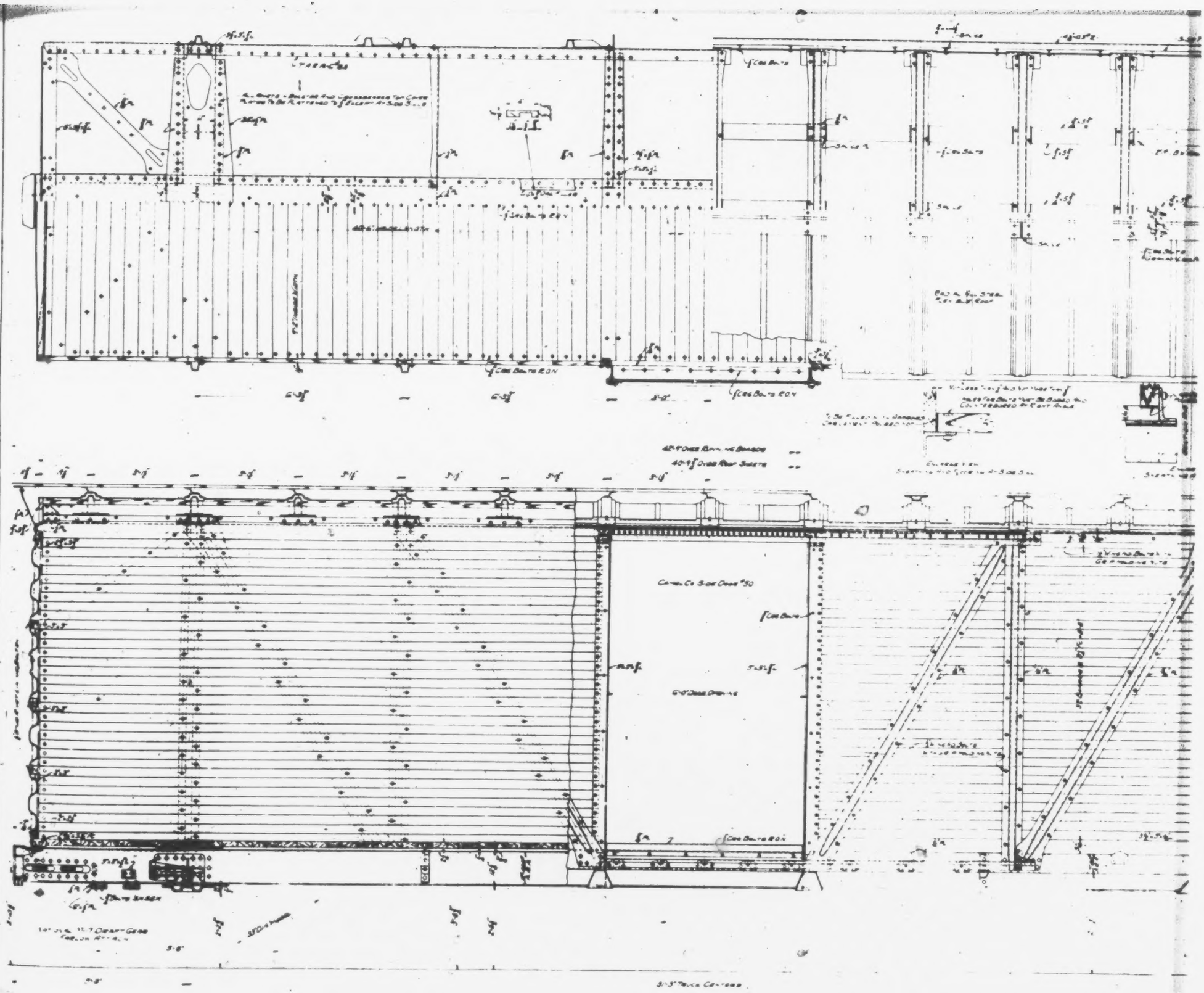
The following exhibits were offered in evidence by the defendant and were received in evidence and marked
"Defendant's Exhibit No. 1,"
"Defendant's Exhibit No. 2,"
"Defendant's Exhibit No. 3A,"
"Defendant's Exhibit No. 3B,"
"Defendant's Exhibit No. 3C,"
"Defendant's Exhibit No. 3D,"
"Defendant's Exhibit No. 3E,"
"Defendant's Exhibit No. 4,"
"Defendant's Exhibit No. 5,"
"Defendant's Exhibit No. 6,"
"Defendant's Exhibit No. 7,"
"Defendant's Exhibit No. 8,"
"Defendant's Exhibit No. 9."

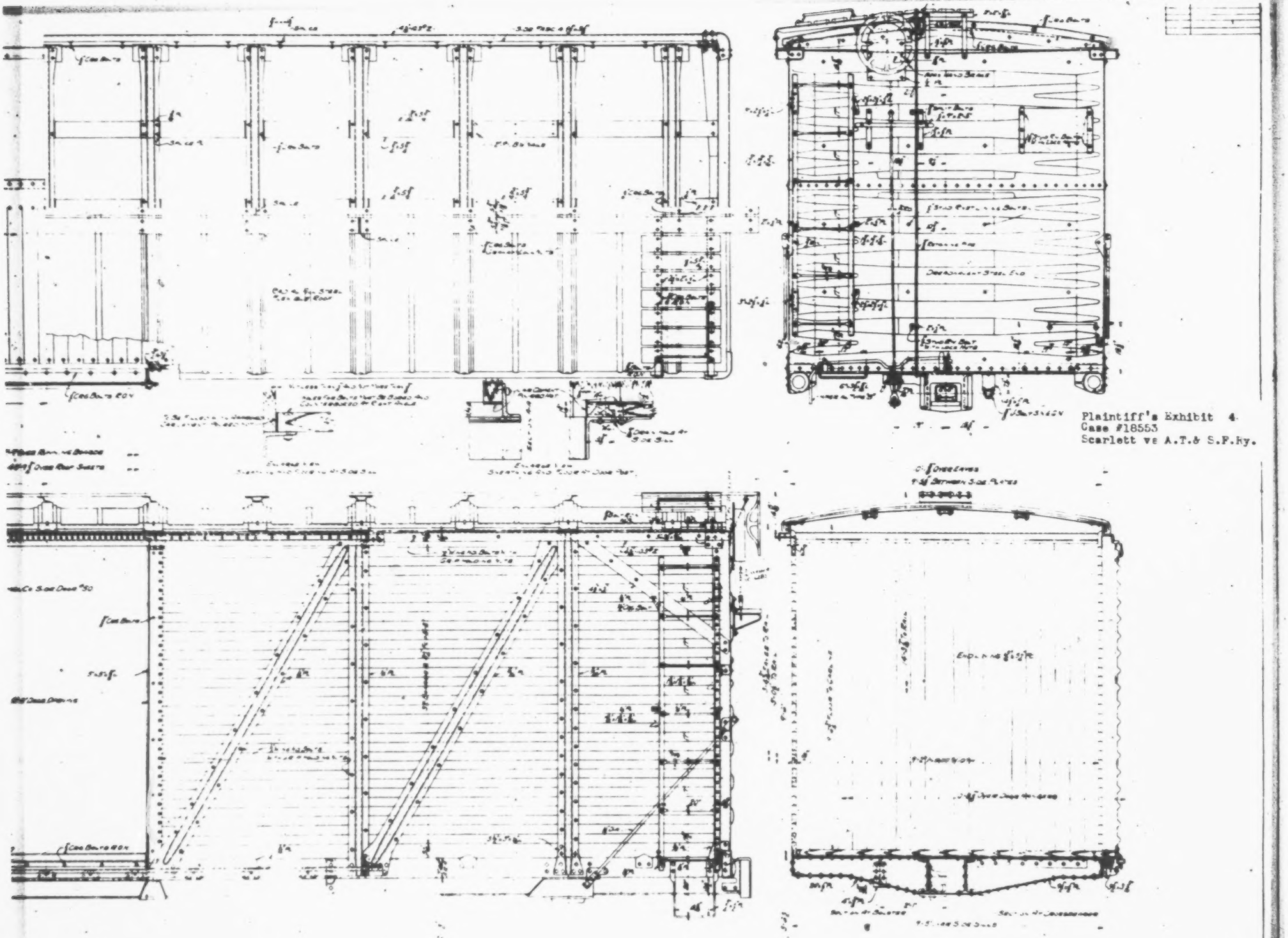
Plt. Exhibit
2.
Scarlett
vs
A. & K. Ry Co.
1905-3



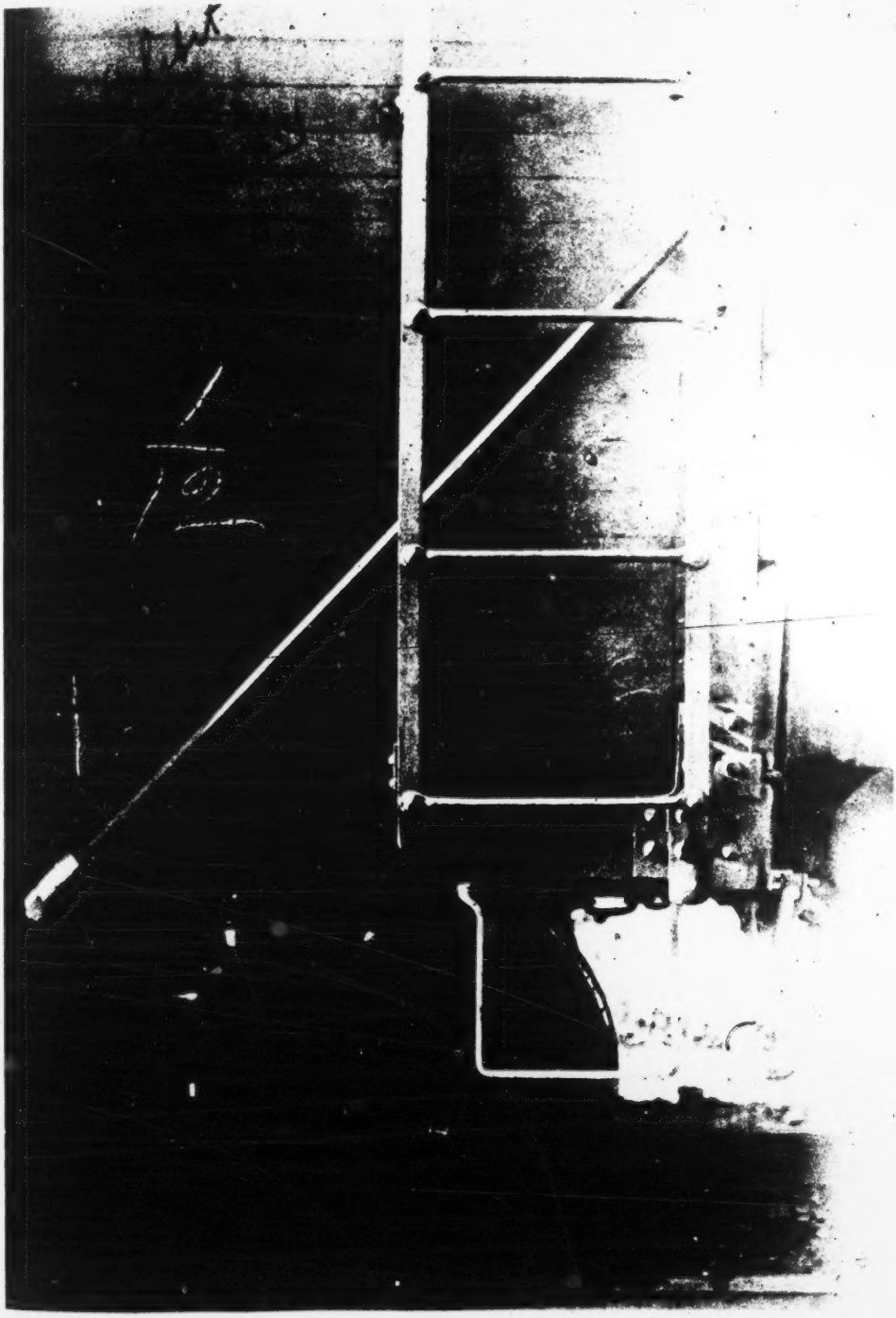
Standpipe Exhibit
3
1853 Scarlett
to
9th Sergt C.

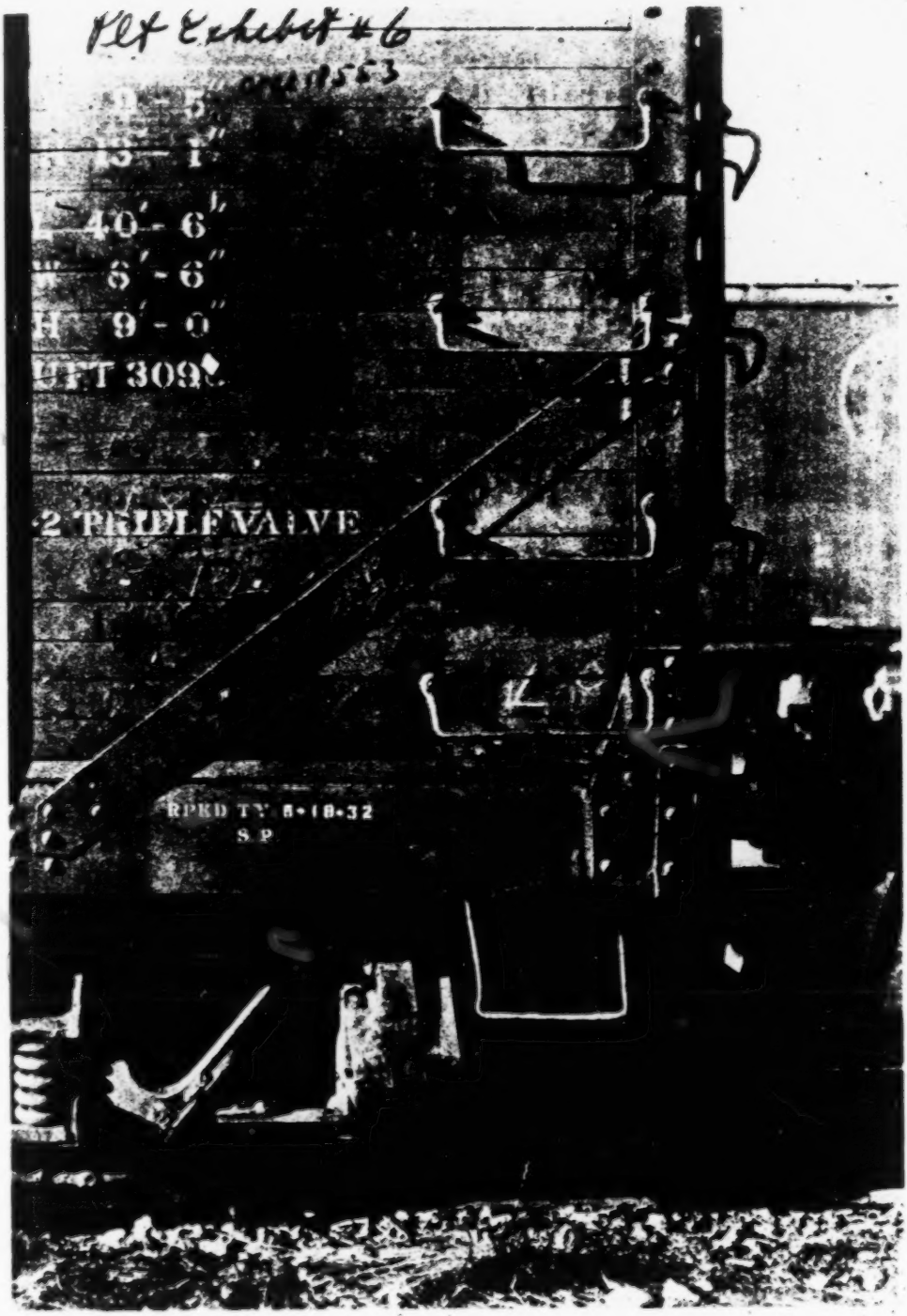






Plaintiff's Exhibit 4
Case #18553
Scarlett vs A.T.& S.F.Ry.




Plt Exhibit #6
-5
13 - 1"
40' - 6"
6' - 6"
H 9' - 0"
T 309
2 PRDLF VALVE
RPRD TY 5-18-32
S P

Pet Exhibit
No 1
obtained
from

[fol. 281] DEFENDANT'S EXHIBIT No. 1

Hall 11 29 20M 8266 1 Case 18553 Deft. Exhibit #1.

Form 1422 Standard

Get the Santa Fe — Santa Fe Coast Lines

Safety Habit (Insert name of Railway Company)

Statement of Witness to Accident

No. —, Valley Division. Accident to W. W. Scarlett A Brak-man at Mormon Calif. Date Aug 27 1931, Hour 12:30 A. M.

Instructions.—Have the witness give names of all other persons that he knows of, who were witnesses to the accident. If possible, have witness sign statement, which should be attested by the person taking the same. Names of other persons should also be given.

Statement of W. W. Scarlett, made to J. R. Anderson at Richmond Calif. on the 2nd day of Sept., 1931 in presence of—— ——.

My name is W. W. Scarlett, Age 52 years. I reside at 766-8th St Richmond. I am a Brakeman by occupation. [fol. 282] Am married [or unmarried]* I have been in the service about 19 years. On August 27th, 1931, I was rear brakeman on Ex East 3146 at time I was injured at Mormon. We had hold of 15 cars and were shoving them down onto balance of our train to make a coupling, after which we were to leave town — I was riding on top of rear car of the cut. I do not remember the number of this car, all I know is that it was the rear car of the cut. I saw the Conductor standing at head car of train to make the coupling, so I walked over top to East end of car and started down the side ladder, on South side of train.

I do not remember whether this was the "A" W W S J R A end or "B" end of the car, but upon second thought, it [was]* seems to me it was the side ladder of the "A" end

of the car, anyway it was the side ladder on the East end of the car. I was about a third of the way down this side ladder, when all at once my foot seemed to slip or flew out, I was not expecting this and my foot slipping brought all [fol. 283] my weight on my hands, causing me to loose my hold and I fell to the ground. The cut was moving about two miles an hour at time of accident, moving along smoothly without any jerking or rough handling of anykind, either or at time of accident. There were no defects of anykind in this side ladder or any other part of equipment, so far as I know and no negligence on part of any other member of crew or anyone else. I do not have any idea as to what caused my foot to slip. My shoes were dry and the soles in first class shape, the ladder was also dry. This was a pure accident and I do not know the cause.

W W S J R A

The doctor estimated there would be a little more than two weeks time lost. I was holding a regular run, paying a little better than $200.00 a month. If an allowance can be made me, it will be very much appreciated. My injuries consist of a sprained back, and both wrists injured, the left being in bad shape at the present time. I was riding on top of rear car to pass signals to engineer. The engine was on a curve and signals from ground could not be seen by enginemen.

I have read the 3 sheets and find them correct.

Witness: J. R. Anderson. W. W. Scarlett.

[fol. 284] DEFENDANT'S EXHIBIT No. 2

Deft. Exhibit #2

Hall 2 30 20M 9129 Form 1422 Standard 18553

Scarlett vs A T & SF Ry

Get The Santa Fe Safety Habit

Santa Fe
The Atchison, Topeka & Santa Fe Ry Co,
Coast Lines

Mar 14 1932

(Insert name of Railway Company)

[*Matter in brackets, struck out in copy.]

Statement of Witness to Accident

No. —, Valley Division. Accident to W. W. Scarlett A Brakeman at Mormon, Calif. Date Aug. 27, 1931, Hour 12:30 AM.

Instructions.—Have the witness give names of all other persons that he knows of, who were witnesses to the accident. If possible, have witness sign statement, which should be attested by the person taking the same. Names of other persons should also be given.

Statement of W. W. Scarlett, made to O. F. Gray at Los Angeles, Calif. on the 14th, day of March 1932 in presence of —— ——.

My name is W. W. Scarlett, Age 52 years. I reside at 766 - 8th St., Richmond. I am a Brakeman by occupation. [fol. 285] Am married [or unmarried]* I have been in service of the Santa Fe Ry. Co. 19 years.

With further reference to accident which resulted in my personal injury on Aug. 27, 1931 since making statement to Mr. J. R. Anderson concerning this accident on Sept. 2nd, 1931, I have learned that cause of accident was that my right foot slipped on the brace that goes diagonal over corner of car inside ladder i e foot slipped.

(Diagram of Side of Car and Ladder)

Mr. Fanning who was Conductor of train pulling by my train told me that [he saw]* there was mark on this rod that appearance of a foot having slipped, this car and rod had been recently painted and I believe was comparatively new—It seems reasonable after thinking over this injury that it was this particular rod coming in contact with my right foot that caused my feet to leave the ladder and cause my hands to jerk from hand hold resulting in the fall. I do not believe this brace should be under the side ladders of cars because it is hazardous to anyone using the ladders. I have warned trainmen since I was injured, of this hazard. In a telephone conversation with my Conductor (W. O. Parks) some time after the accident, he told me he [thought]* nearly fell off one of this same class cars after I was hurt, due to his foot having struck this rod.

[*Matter in brackets, struck out in copy.]

[fol. 286] In a conversation with Mr. Fanning Conductor, some time after accident, he said, he couldn't swear that if was my foot that caused the mark on

O F G W W S

this rod, but the mark was there and he gave it as his opinion that my foot slipped on this rod and caused the fall = There were no eye witnesses to the accident and these men are basing their conclusions on observation of this or other cars of like construction. I have read the above statement of the three sheets & it is true and correct.

Witness: O. F. Gray. W. W. Scarlett.

(Photostats)

The defendant submits the foregoing as its proposed bill of exceptions in the above entitled action and prays that the same be settled, allowed and ordered filed.

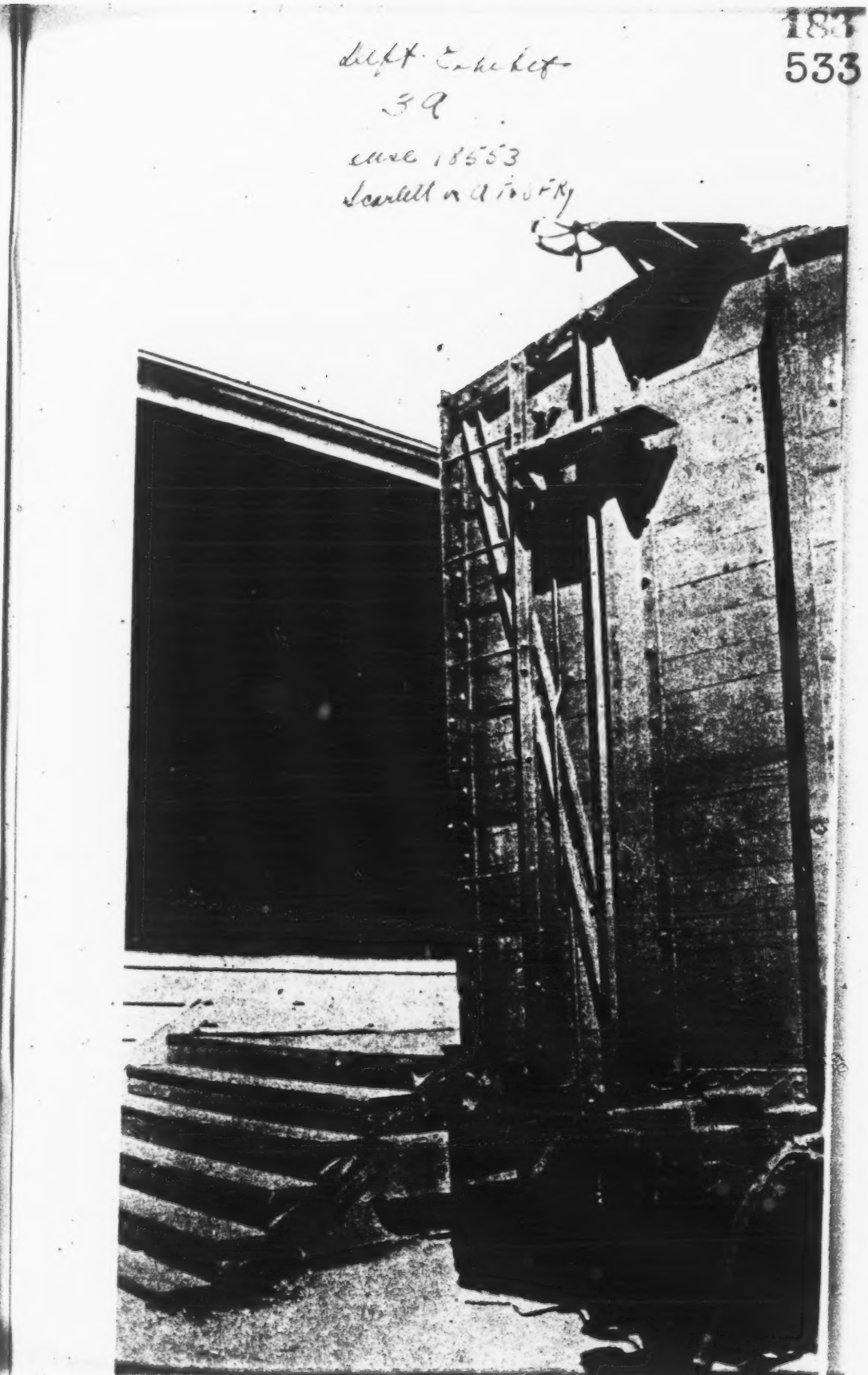
Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for Defendant.

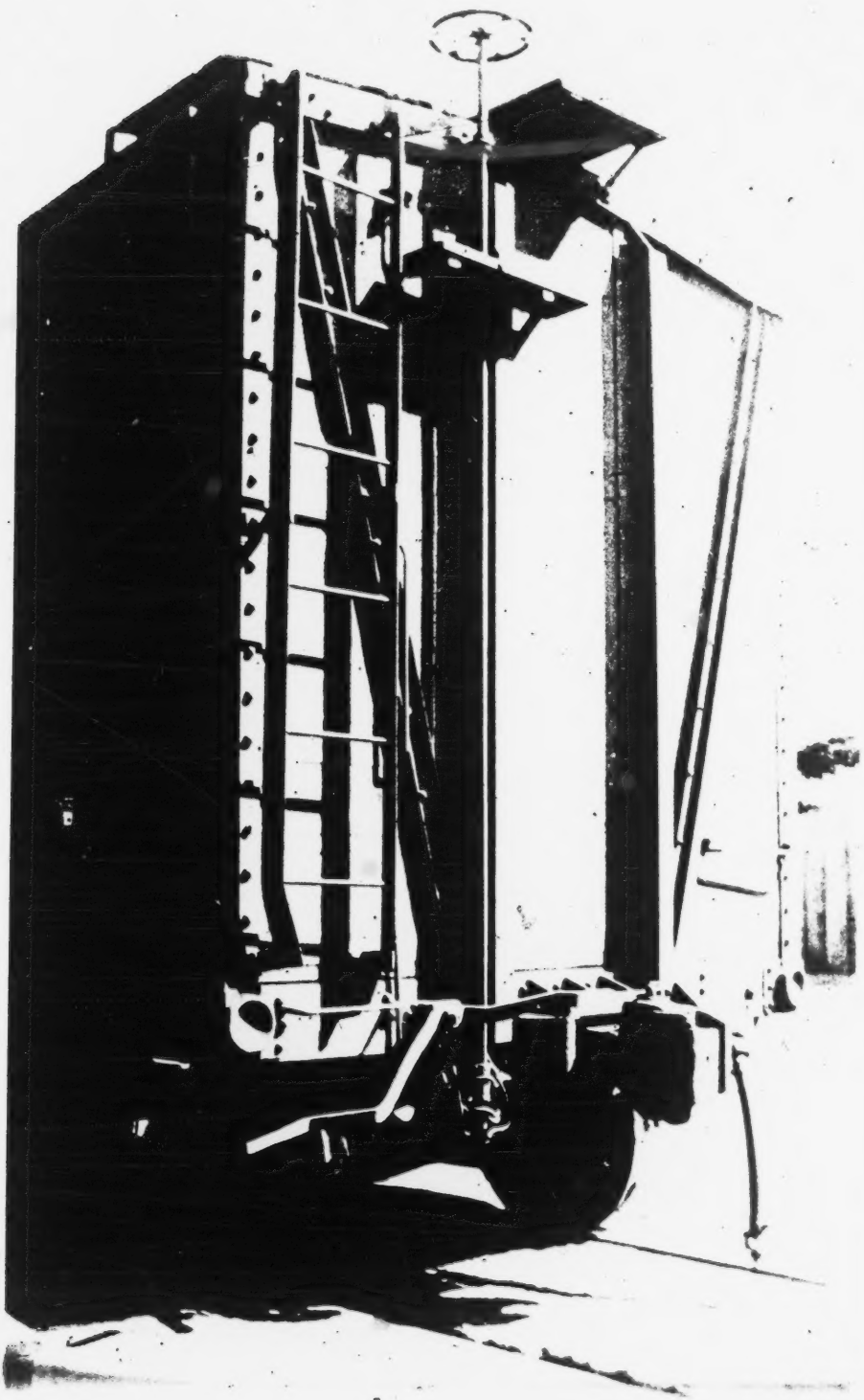
[File endorsement omitted.]

[* Matter in brackets, struck out in copy.]

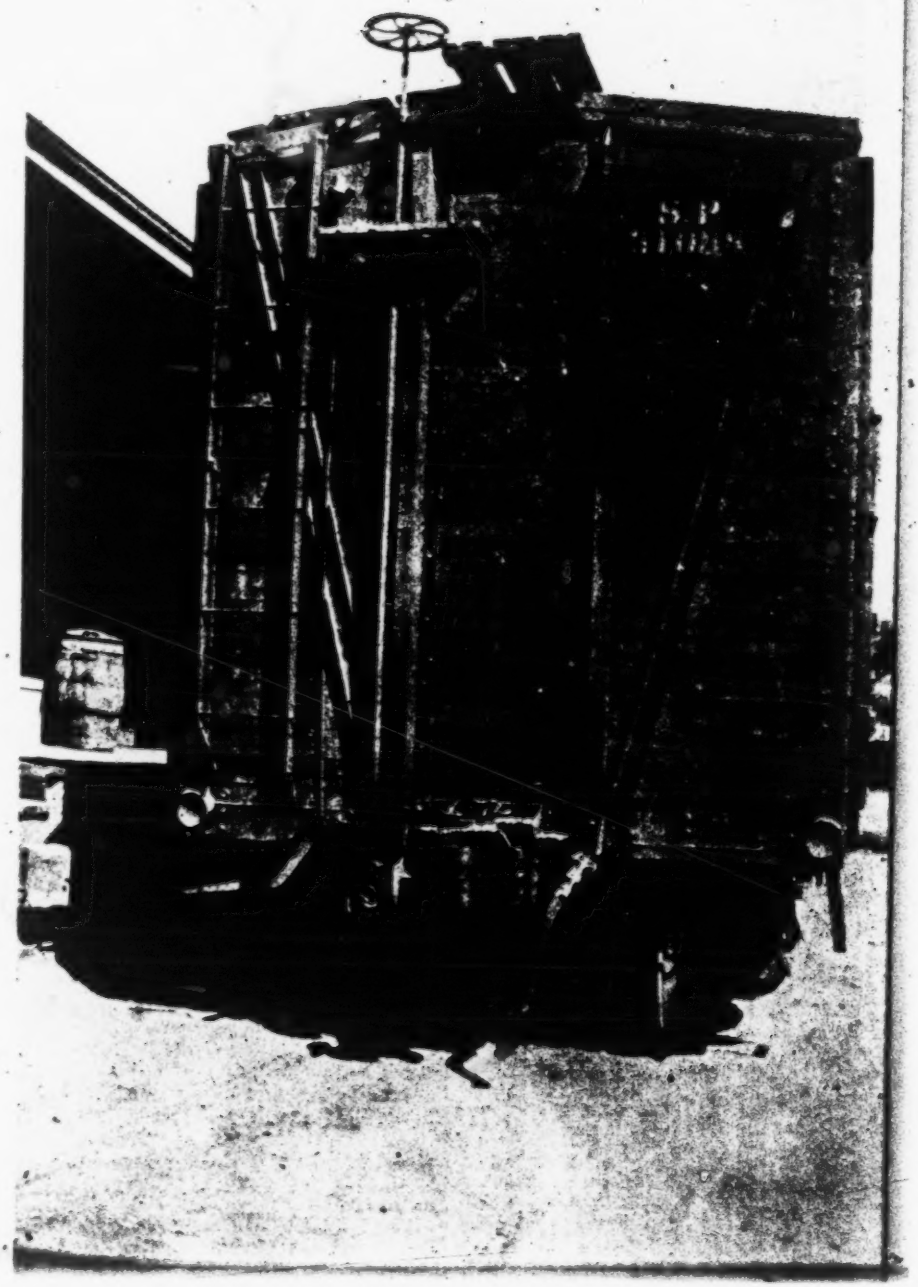
183
533

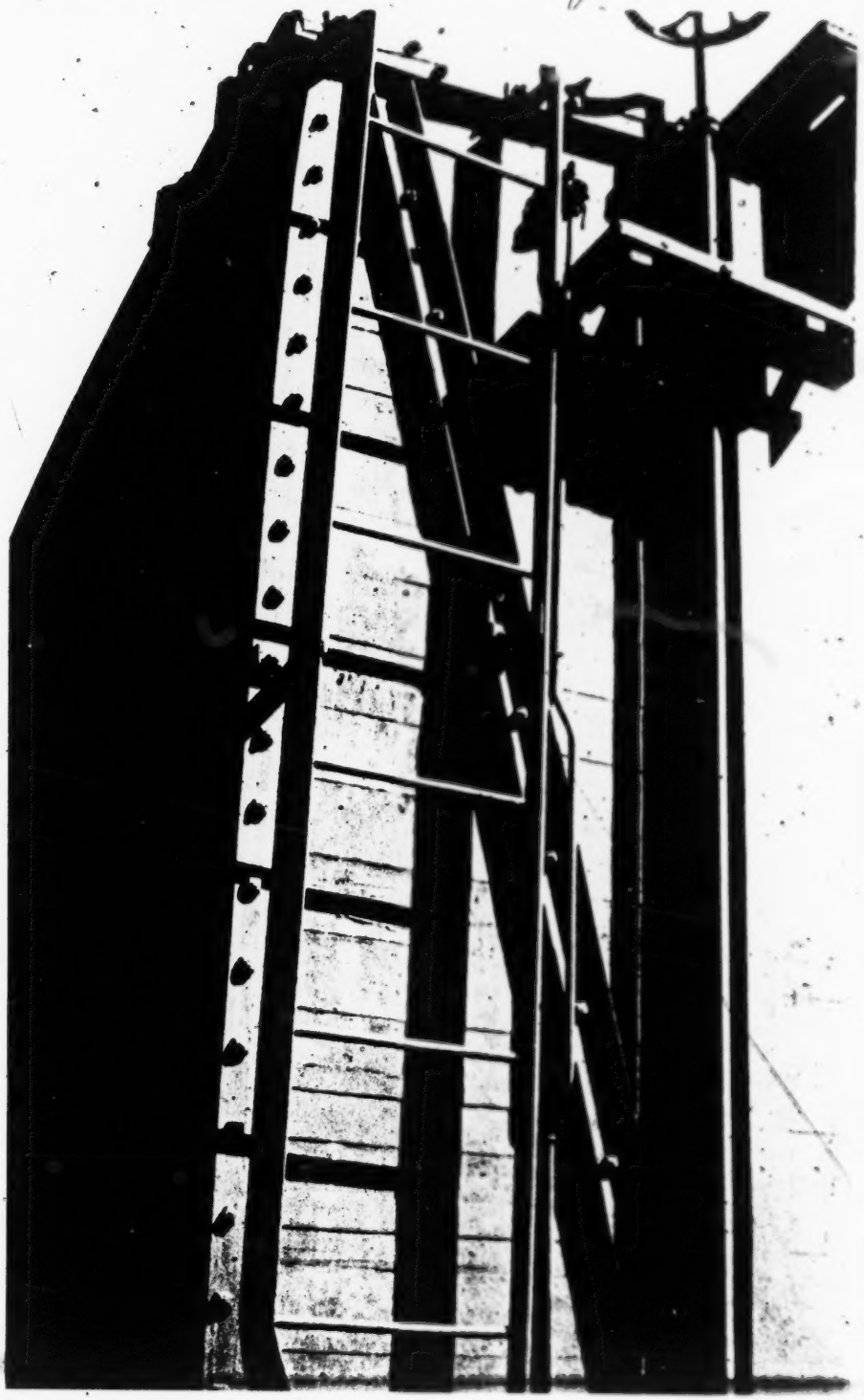
Defft. Exhibit
39
case 18553
Scarlett v. C. & O. R'y





D.C.P. Exhibit
No. C
Case 1-2-3
Entered in Evidence





537

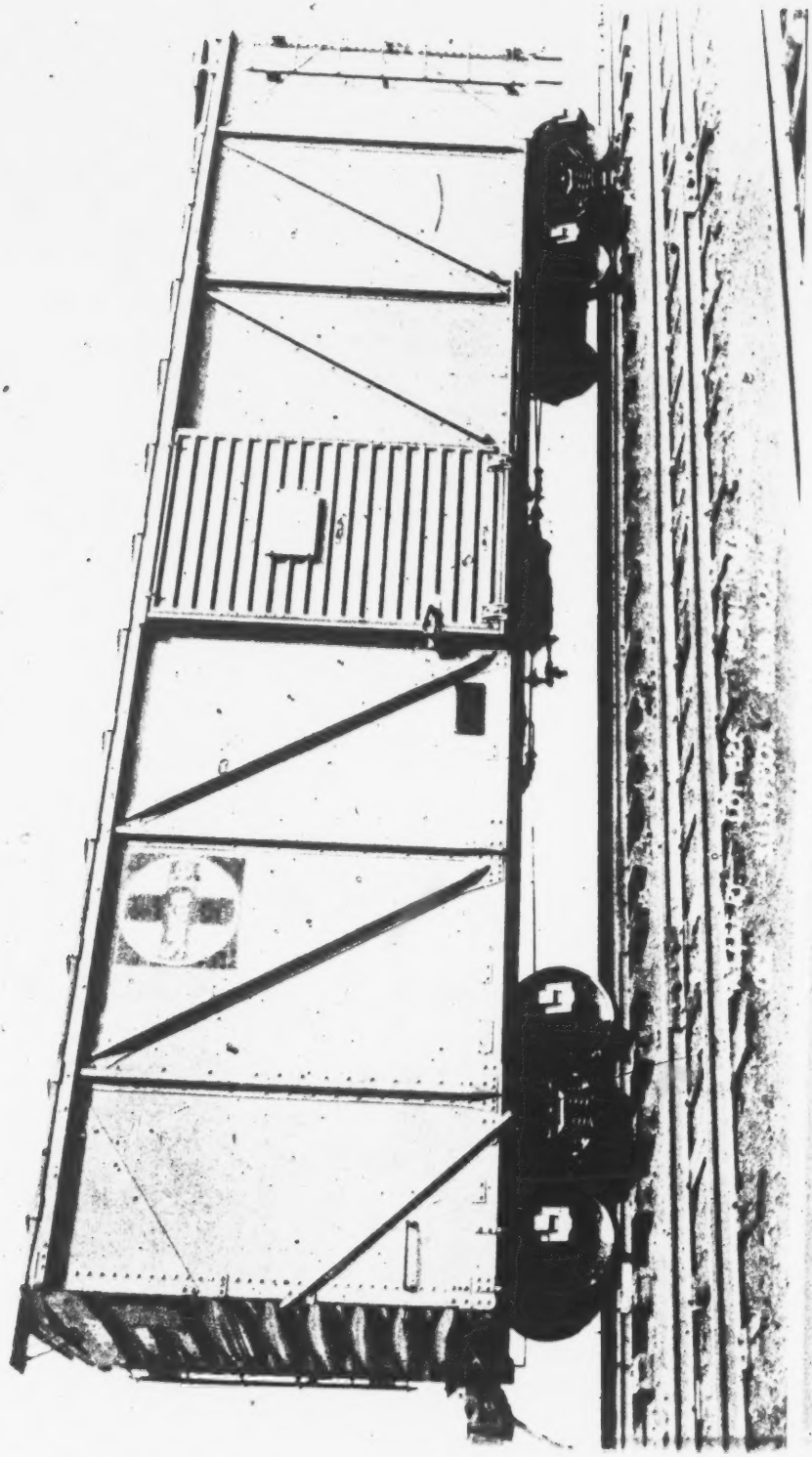
Left Exhibit

3 E

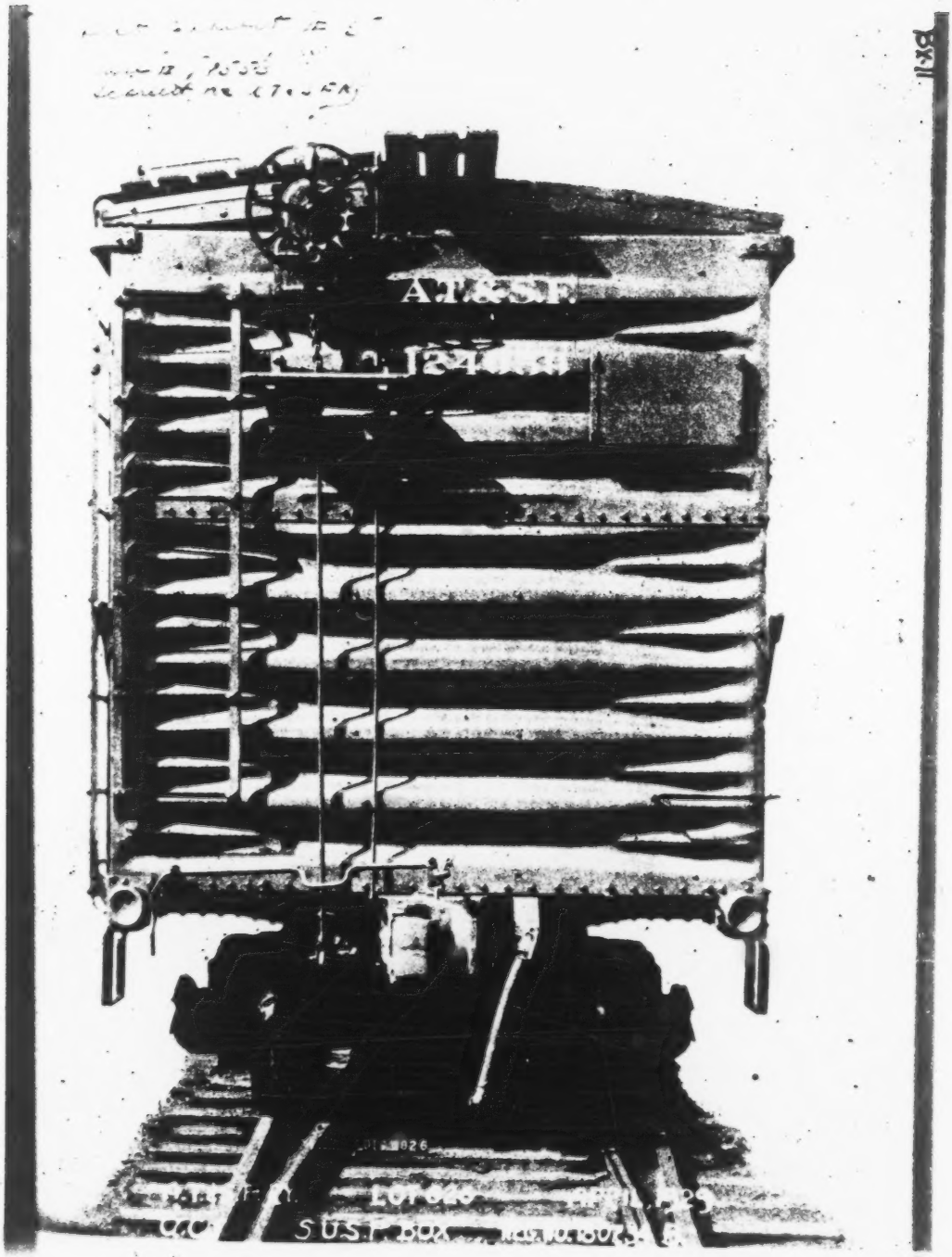
Case 11-5-53

Acquitted A. & S. F. Ry

Dept Exhibit # 4
case 19553
Scarlett vs A.T. & S.F. Ry

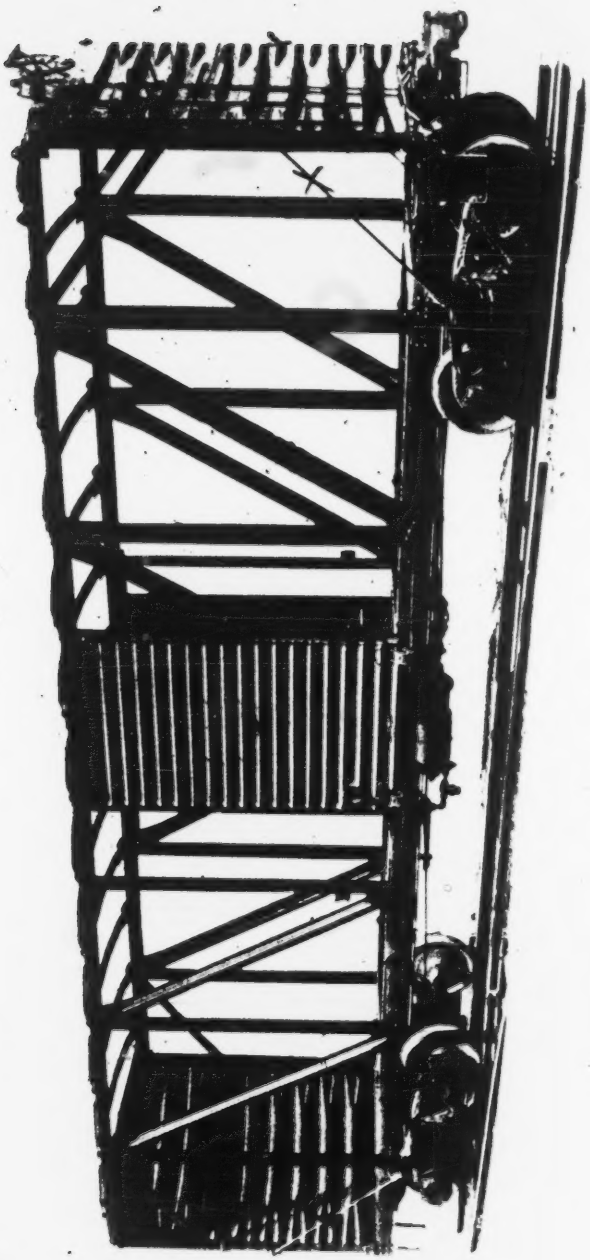


Def't Exhibit # 5
case # 19553
Docket No QT-5 ERJ



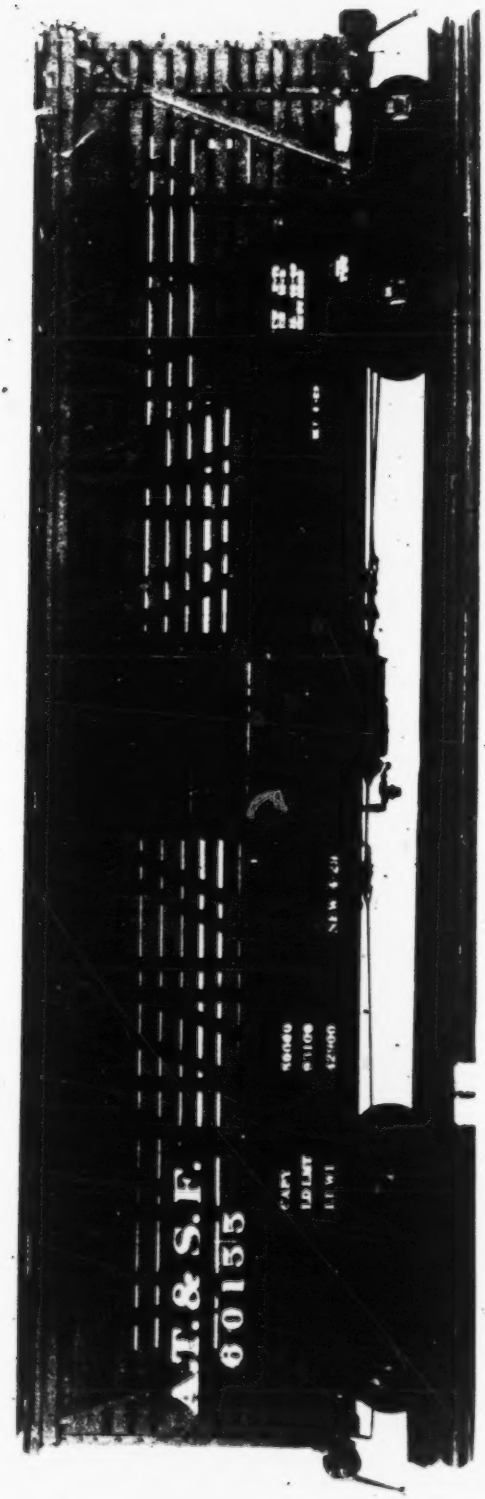
Def Exhibit #6

case 1003
Scarlett vs A.T. & F.Y.



#1

Def't Exhibit # 7
Case 11553
Scarlett v. G.T.S.F. Ry



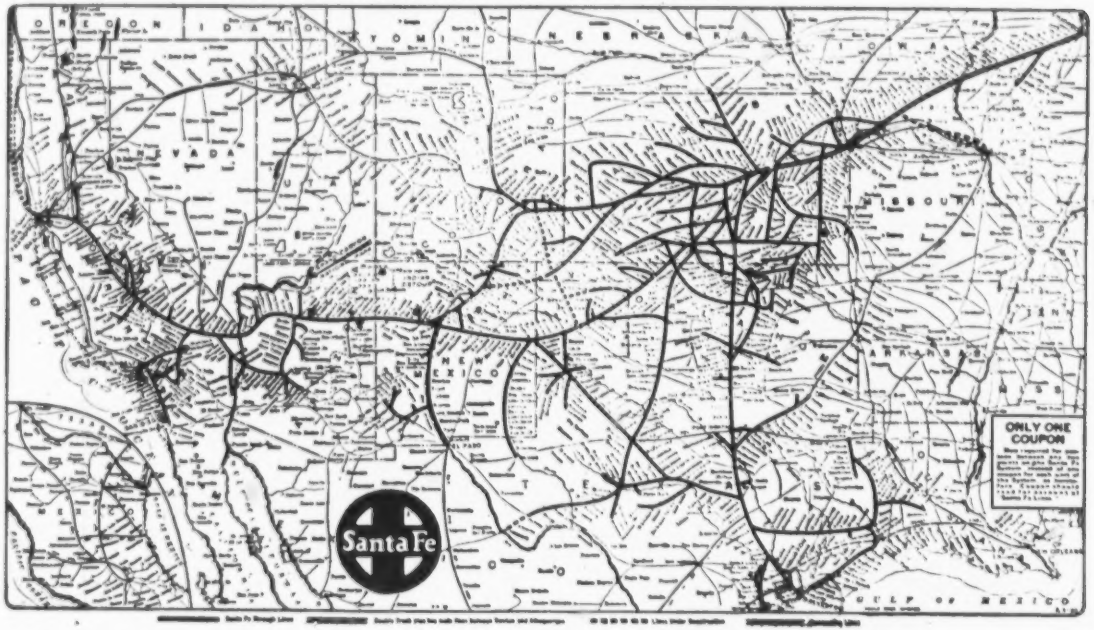
#3.
A-1103

Def't Exhibit # 8
Case 18553
Scarlett vs. T. St. R.

SANTA FE
SAFETY FIRST

"Every employe should report promptly to his foreman, some member of Safety Committee, or other proper person, all unsafe conditions or practices."

(See General Rules E and F, Book of Rules.)



543

The Atchison, Topeka & Santa Fe Railway Co.
Coast Lines

VALLEY
AND
SAN FRANCISCO TERMINAL DIVISIONS

EMPLOYES' TIME TABLE No. 65

IN EFFECT
SUNDAY, APRIL 26, 1931,
AT 12:01 O'CLOCK A. M.

PACIFIC STANDARD TIME

Superseding Time Table No. 64, Dated August 10, 1930, and any Supplements thereto.

This Time Table is for the Government and Information of Employes of this Company only.

W. K. ETTER,
GENERAL MANAGER,
Los Angeles, Cal.

C. G. FLUHR,
SUPERINTENDENT,
Valley Division,
Fresno, Cal.

J. A. CHRISTIE,
SUPERINTENDENT,
San Francisco Terminal Division,
San Francisco, Cal.

V. J. IMHOFF,
CHIEF DISPATCHER

A. C. HARGIS,
NIGHT
CHIEF DISPATCHER,

F. J. MacKIE
ASSISTANT GENERAL
MANAGER
Los Angeles, Cal.

H. H. TISDALE,
TRAINMASTER,
Valley Division,
Fresno, Cal.

E. W. TERRY,
TRAINMASTER,
San Francisco Terminal Division,
Richmond, Cal.

J. D. SUTHERLAND,
J. H. ZIESKE,
J. L. HARTZELL,

S. A. WYSONG,
H. HOLDER,
P. W. ARCHIBALD,

E. M. TAYLOR
DISPATCHERS, Fresno, Cal.

Reverse side of
Defendant's Exhibit 9
Scarlett vs A.T.& S.F.Ry.

544

[fol. 287] IN SUPERIOR COURT OF CONTRA COSTA COUNTY

[Title omitted]

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated that the within and foregoing bill of exceptions is true and correct and that the same may be settled and allowed by the court forthwith as said defendant's engrossed bill of exceptions on its appeal from the judgment and order denying its motion for a new trial and for any and all purposes for which such bill of exceptions may be properly used.

Dated, Los Angeles, California, April 16, 1934.

Clifton Hildebrand, James F. Hoey, Attorneys for Plaintiff. Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Atchison, Topeka and Santa Fe Railway Company.

[fol. 288] IN SUPERIOR COURT OF CONTRA COSTA COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS

It is hereby ordered that the within and foregoing bill of exceptions be and the same is hereby settled and allowed and ordered filed as said defendant's engrossed bill of exceptions on its appeal from the judgment and order denying its motion for new trial in this action and for any and all purposes for which such bill of exceptions may properly be used.

Dated, Martinez, California, April 16th, 1934.

A. B. McKenzie, Judge.

[File endorsement omitted.]

[fol. 289] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 290] In Superior Court of Contra Costa County

Stipulation as to Record

It is hereby stipulated and agreed by and between the respective counsel in the above entitled action that the foregoing printed transcript on appeal is correct and contains full, true and correct copies of the complaint, answer, verdict, judgment on verdict, notice of appeal and bill of exceptions, together with the endorsements on said papers and documents, all of which papers and documents are a part of the files and records of the Superior Court.

Dated this — day of May, 1934.

——— ———, ——— ———, ——— ———, Attorneys for Defendant and Appellant. ——— ———, ——— ———, Attorneys for Plaintiff and Respondent.

[fol. 291] [Stamp:] Office of the Clerk, Supreme Court U. S. Received Oct. 14, 1936

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. —

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Petitioner,

vs.

WILLIAM W. SCARLETT

On Writ of Certiorari to the Supreme Court of the State of California

[fol. 292] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Monday, May 27, 1935.

S. F. 15448

1/9527

SCARLETT

vs.

A., T. & S. F. Ry.

Respondent's petition to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal of the 1st Appellate District, Division 2, is granted, and said cause transferred to this court for hearing and decision.

Dated May 27, 1935.

Waste, C. J. Shenk, J. Curtis, J. Thompson, J.

[fol. 293] (Minute Order San Francisco Session, October 3, 1935)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

S. F. 15448

SCARLETT

vs.

ATCHISON, TOPEKA AND SANTA FE RY.

Cause called for hearing on merits and argued by H. K. Lockwood, with whom Leo E. Sievert and Hartley F. Peart also appeared on behalf of appellant and L. E. Goodman, with whom L. H. Brownstone, Jr., also appeared on behalf of respondent, and submitted.

[fol. 294] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Friday, January 31, 1936.

S. F. 15448

SCARLETT

vs.

ATCHISON, TOPEKA AND SANTA FE RY.

Judgment is affirmed.

Seawell, J.

We concur: Curtis, J. Waste, C. J. Shenk, J. Conrey, J. Langdon, J.

[fol. 295] Endorsed: Filed Jan. 31, 1936. B. Grant Taylor, Clerk, by W., S. F. Deputy.

S. F. No. 15448. In Bank.

January 31, 1936.

WILLIAM W. SCARLETT, Plaintiff and Respondent,

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY (a Corporation), Defendant and Appellant

Plaintiff recovered judgment against defendant Atchison Topeka and Santa Fe Railway, a corporation, for $18,000 damages for personal injuries received by him in the course of his employment by said defendant as a brakeman. Defendant appeals from the judgment.

The accident took place on August 27, 1931, at Mormon, California. Plaintiff had been upon the top of the rear car [fol. 296] of a cut of freight cars in the course of his employment, and was descending the ladder on the side of the car when his foot slipped and he fell to the ground. He received serious injuries, including the fracture of bones of his left wrist. It became necessary to remove certain of the bones of the wrist, with the result that plaintiff has suffered a permanent disability to his left hand, wrist and arm, which prevents his continuance in employment as a railroad brakeman.

The ladder from which plaintiff fell is located on the side of the car, within a few inches from the end of the car. Back of the ladder, in a diagonal position, is a round metal rod, which serves to brace the end and side of the car. Plaintiff attributed his fall to the presence of this diagonal brace rod. He testified that as he descended the ladder his foot came in contact with the diagonally placed round brace rod, instead of the horizontal ladder rung, causing him to lose his footing and fall to the ground. At the time plaintiff fell, the train was moving at a speed of about two miles an hour. It is his contention that the presence of this round bar rendered the ladder insecure, in violation of provisions of the Federal Safety Appliance Act of 1910. (36 U. S. Stats. at L., p. 298, U. S. C. A., title 45, secs. 11-16.) Where an injury is proximately

caused by a condition existing in violation of any of the several safety appliance acts of Congress, including the Boiler Inspection Act (36 U. S. at L., p. 913, U. S. C. A., [fol. 297] title 45, secs. 23-34), the carrier is absolutely liable therefor, although it is ignorant of the defect and has used ordinary care to maintain its equipment in the required condition. (St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 294; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 527; Illinois Central R. R. Co. v. Williams, 242 U. S. 462, 466; Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 43; U. S. v. Chicago, St. P., M. & O. Ry., 43 Fed. (2d) 300, 302.) The effect of said acts is to substitute an absolute liability for the common-law liability based on negligence. Not only is the liability absolute, but by express statutory provision the defenses of assumption of risk and contributory negligence are eliminated. (27 U. S. Stats. at L., 532, U. S. C. A., title 45, sec. 7; 35 U. S. Stats. at L., p. 66, U. S. C. A., title 45, secs. 53 and 54; Great Northern Ry. Co. v. Donaldson, 246 U. S. 121; Texas & Pac. Ry. v. Rigsby, supra; Ballard v. Sacramento N. Ry., 126 Cal. App. 486, 490.) Where the action is not predicated upon a violation of safety appliance acts, but on common-law negligence not constituting a violation of said acts, the defense of assumption of risk is permitted, and as to contributory negligence the statute provides that damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. (U. S. C. A., title 45, sec. 53; Erie R. Co. v. Lindquist, 27 F. (2d) 98.)

In the instant case the plaintiff bases his claim to recover on a violation of the provisions of the Safety Appliance [fol. 298] Act of 1910 to the effect that "all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards". (36 U. S. Stats. at L., p. 298, U. S. C. A. title 45 sec. 11.) He relies solely on the presence of the round diagonally placed bar behind the ladder, which, he contends, rendered it insecure in violation of the act. On the trial he expressly waived any rights of recovery he might have based on common-law negligence independently of the above-quoted provision of the Safety Appliance Act. Accordingly the trial court sustained plaintiff's objection to evidence by which defendant sought to show assumption of risk.

By virtue of section 3 of the Safety Appliance Act of 1910, (supra), the interstate commerce commission has authority to designate "the number, dimensions, location, and manner of application of the appliances" provided for by the act. The carrier is subject to a penalty of $100 for permitting any car to be hauled on its line not equipped as provided in the act. (sec. 4) By virtue of the authority vested in it by Congress, the Commission has specified certain requirements for ladders, including a specification for clearance as follows: "Minimum clearance of treads, two (2), preferably two and one-half (2½) inches". It is admitted herein that there is a space of 2¾ inches between the outside of the round diagonal bar and the inside of the ladder rungs.

[fol. 299] Defendant contends that in view of this 2¾ inches clearance it must be held as a matter of law that the ladder was "secure"; that the Interstate Commerce Commission is entrusted by Congress with authority to determine the requirements for safety appliances, and an appliance cannot be held insecure or unsafe in a respect in which it fully complies with the Commission's rules.

Respondent contends that the rules of the Commission merely establish minimum requirements; if an appliance fails to comply with a rule of the Commission, it must as a matter of law be held insecure or unsafe, but it does not follow that because it conforms to the rule that it is safe or secure; the statute requires a secure ladder, meaning a safe ladder, and it is for the jury to determine whether a ladder conforming to rules of the Commission is secure. Respondent further contends that if compliance with a rule as to a particular matter renders the appliance "secure" as a matter of law in that regard, nevertheless where the insecurity lies in a detail as to which the Commission has no rule, it is for the jury to say whether the appliance is secure. Applying this argument to the instant case, respondent contends that the rule of the Commission providing for a clearance of 2–2½ inches for ladders contemplates clearance between the flat side of the car and the ladder, and does not authorize the introduction into the [fol. 300] clearance space between car side and ladder (even though it is greater than 2½ inches) of a round bar standing out from the side of the car and diagonally placed behind the ladder in such manner as to create a hazard to

employees in using it. It has been held that "secure" means more than firmly fastened; it means safe for use in the purpose for which it is intended. (Davis v. Reynolds, 280 Fed. 366.)

We are of the view that respondent can succeed herein only if the rule as to clearance was not intended to cover the situation shown by the facts herein. If the rule applies, it must be held that the ladder is "secure". Respondent's contention that the rules of the Commission prescribe mere minimums, although it finds support in Western & A. R. R. v. Meister, 140 S. E. (Ga.) 905, is contrary to the weight of authority and to better reasoning. The Commission has facilities to conduct expert investigation and inquiry as to safety appliances which a jury deciding a single case lacks. Under the act of 1910, the specifications of the Commission "shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act". In view of the fact that violation of the statutory duty to provide safe and secure equipment and appliances is attended with absolute liability, and not dependent on failure to exercise due care to provide safe equipment, as was the common-law liability, it is of importance to the carrier to know in an exact manner [fol. 301] what it can do to discharge this duty. The rules of the Commission prescribe the "standards" of equipment, and where the carrier has complied exactly with a rule of the Commission, its equipment cannot be held insecure in that regard.

In the standardization itself there is an element of safety. In Illinois Central R. Co. v. Williams, 242 U. S. 462, 466, the Supreme Court stated that it was the purpose of the safety appliance acts to make the appliances ultimately conform to a standard to be prescribed by the Commission, in order that uniform appliances should be found in the same place by employees who work always in haste, and often in darkness and storm.

In Lancaster & Wight v. Allen, 217 S. W. (Texas) 1032, it was contended that the flange of a locomotive wheel had become worn to such an extent that the locomotive was "not in proper condition and safe to operate" under the Boiler Inspection Act. (36 U. S. Stats. at L., p. 913; 38 U. S. Stats. at L., p. 1192, U. S. C. A., title 45, sec. 23 et seq.) It was held that if the flanges had not become worn to the extent

prescribed with particularity by a rule of the commission in defining defective flanges, the railroad could not be held guilty of negligence in that regard. To the same effect are: Lehigh V. N. E. R. Co. v. Smale, 19 Fed. (2d) 67; Mahutga v. Minneapolis, St. P. S. S. M. Ry. Co., 234 N. W. (Minn.) 474; Auschwitz v. Wabash Ry. Co., 178 N. E. (Ill.) 403. It might be that if the Commission made a rule which so [fol. 302] palpably tended to endanger the safety of employees that reasonable minds could not differ as to its effect, it would not be binding. The authority vested in the Commission is to make regulations which will promote safety. But it is not to be contemplated that the Commission will abuse its authority.

This brings us to respondent's second contention, that the Commission's rule as to 2-2½ inches clearance for ladders was not intended to govern the situation where the clearance space between car side and ladder, although greater than 2½ inches, contains a hazardous diagonally placed round brace-rod. Where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the Commission has failed to regulate a particular matter, that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail. By sections 3 and 4 of the act of 1910 (U. S. Stats. at L., p. 298), a penalty is provided for failure to comply with the act, and not only for violations of rules promulgated by the Commission. This conclusion is fortified by decisions interpreting another provision of the act. Section 3 provided that the commission should make rules within six months, but that it might extend the period [fol. 303] within which any carrier should comply with respect to equipment in service when the act was passed. It was held that although the Commission might extend the time for compliance with its rules, there was a duty to supply "secure" appliances from the effective date of the act, and the Commission could not extend the time for compliance with this mandate. (Illinois Central R. Co. v. Williams, 242 U. S. 462; Tyon v. Wabash Ry. Co., 232 S. W. 786.) As to injuries occurring before the rules became effective, the question was whether the appliance

was "secure". The same question is now presented when there is a claim of insecurity as to a matter not regulated by rule of the Commission. The act of 1910 became effective July 1, 1911. The Commission extended the date for compliance with its rules to a date more than five years later.

In Baltimore & O. R. Co. v. Groeger, 288 Fed. 321, the court said: "While the Interstate Commerce Commission is authorized to make rules and orders in furtherance of the enforcement of this law (the Boiler Inspection Act) nevertheless its failure to make a rule or an order covering every defective condition or construction within the meaning of section 2 of the Boiler Inspection Act by no means relieves the carrier from complying with the provisions of that section." This language is equally applicable to the Safety Appliance Act of 1910. The Boiler Inspection Act (36 U. S. Stats. at L., p. 913) requires the appliances subject thereto to be "in proper condition and safe to operate in the service to which the same are put". The Safety [fol. 304] Appliance Act of 1910 requires ladders to be "secure", which has been interpreted to mean safe for the use to which they are to be put. (Davis v. Reynolds, supra.) The Supreme Court reversed the Groeger case for certain error in instructions (266 U. S. 521), but it expressly recognized that as the Commission had not regulated completely the matter as to which it was claimed the equipment was defective, there was a question for the jury as to whether the boiler was in proper and safe condition. (See; also, Gerow v. Seaboard Airline Ry., 128 S. E. (N. C.) 345; Davis v. Reynolds, supra; Pennell v. Philadelphia, Reading Ry., 231 U. S. 675.)

The jury viewed a freight car with a ladder of the construction shown in the instant case. Photographs of ladders of this type, and of other ladders appear in the record. We are of the view that the jury was justified in its decision that this bar constituted a hazard which rendered the ladder insecure, unless it must be held that the clearance rule of the Commission legalizes the position of the bar.

The distance from the side of the box car to the inside of the diagonal brace rod is ⅞ of an inch; the diameter of the rod is 1⅛ inches; the distance from the outside of the diagonal brace rod to the inside of the rungs of the ladder is 2¾ inches. The rule of the Commission is simply:

"Minimum clearance of treads, two (2), preferably two and one-half (2½) inches." The rule of the Commission contains no reference to bracing, which in some type is generally found on the side of freight cars at the end in a position behind the side ladder. On wooden cars a brace [fol. 305] of some type is needed to protect the car because the greatest strain and stress is at the ends of the car. Diagonal braces consisting of flat pieces of metal, several inches in width and bolted to the side of the car, and diagonally placed "U" shaped metal braces, the bottom of the "U" being bolted to the side of the car, are used by other railroads and were used by defendant until it adopted the round rod type of brace in 1929. The defendant is the only railroad using a brace of this precise type, and it has a large number of cars so braced in use. According to witnesses for defendant, braces of the flat or "U" type may buckle in use, which renders them useless as a brace and reduces the clearance between car side and ladder, with the result that the car must be sent to the shop.

The rules of the Commission pertaining to ladders were adopted in 1911, including the clearance provision. The type of construction with the round rod brace bar was not used until 1929. It seems readily apparent from the photographs and testimony that the round brace rod constitutes a far greater hazard to safety than does the flat metal brace bolted to the car side. As to the relative safety of the "U" type of brace, as compared with the round rod type used by defendant, the distinction as to safety is not so clear. The extent to which the "U" type is in use does not appear. It should also be pointed out that the other types of diagonal braces, except one, as shown by photo- [fol. 306] graphs, also differed from the round rod type in that they ran from a point on the bottom line of the car side or car end diagonally to the top corner, whereas the round rod runs from a point on the bottom line of the side of the car to a point on the side line of the car side approximately midway between the top and bottom, and a second brace, of the flat type, then runs from the midway point diagonally to a point on the top line of the car side. This causes the round rod to pass under the ladder rung at a different angle, and different position in relation to the ladder rungs than the single brace bar, which may render

the round rod a greater hazard than the other types of bracing.

The Safety Appliance Acts are to be liberally consfrued for the purpose of relieving trainmen of danger. (U. S. v. Chicago St. P. M. & O. Ry. Co., 43 F. (2d) 300; Frye v. Chicago R. R. & P. Ry. Co., 195 N. W. (Minn.) 629.) A similar construction should be given to rules of the Commission formulated under authority of these Acts. In the light of this principle, we conclude that the clearance rule of the Commission should not be construed as a legalization of the round rod type of brace in the space between car side and ladder, which creates a greater hazard than some, if not all, of the types of bracing generally in use when the Commission's rule was adopted; that in such cases, even though there is a space of slightly more than [fol. 307] 2½ inches between the outside of the round bar and the inside of the ladder rungs, it is for the jury to say whether the ladder is secure within the meaning of the Safety Appliance Act of 1910.

What we have here said is not to be understood as an approval or requirement of any particular type of construction. It is for the railroads and the Interstate Commerce Commission to solve engineering problems. But where the Commission has not made a rule as to a particular matter, it is for the jury to decide whether the appliance is "secure". Evidence of the use of diagonal bracing, although of a different type, by other roads, and testimony of certain of defendant's witnesses that they knew of no other accident attributed to the round rod, were before the jury for consideration. The fact that other roads had accepted defendant's cars of this type for movement over their lines, and the further fact that the Commission had made no specific regulation as to these bars, although they had been in use since 1929, were circumstances to be weighed by the jury.

A carrier is authorized to refuse any car of another line if it does not comply with the safety appliance acts, and if it accepts a car which violates those acts, it is absolutely liable for injury due to such violation. (27 U. S. Stats. at L. p. 531, U. S. C. A., Title 45, sec. 3; Tyon v. Wabash Ry. Co., 232 S. W. (Mo.) 786, 790.) But we are of the view that these several facts, although pertinent for the consid- [fol. 308] eration of the jury, do not compel the conclusion

that as a matter of law the ladder was "secure" within the meaning of the statute. (Great Northern Ry. v. Donaldson, 246 U. S. 121, 128; U. S. v. Chicago, St. P. M. & O. Ry. Co., 43 Fed. (2d) 300, 315.)

For the most part defendant's assignments of error in the giving or refusing of instructions are disposed of by what we have said above. After the court had instructed the jury, it returned to ask certain questions of the judge. It appears that the jury wished to know whether in view of the clearance rule quoted above, it was authorized to find for plaintiff notwithstanding there was a space of more than 2½ inches between the diagonal bar and the ladder rung. The question was not very clearly put, and the judge's answer, as well as certain remarks made by him during the course of the trial and in the instructions already given, contains statements which might indicate a misconception of the law to the effect that although the Commission had made a rule in regard to a particular detail of construction, nevertheless it was for the jury to say whether an appliance which conformed to the rule was "secure" in that regard. But the judge also said: "Now any provision or any condition imposed by the Interstate Commerce Commission, a compliance with that you could not—if that was complied with, you couldn't raise the question of negligence because they have to follow that particular rule." We are of the view that the remarks of the judge which may seem to be in conflict with the quoted statement do not constitute reversible error.

[fol. 309] If this were a case where a rule of the Commission regulated the matter under consideration, and liability depended on whether the facts showed compliance with said rule, it might well be held that the judge's statements constituted reversible error. But we have held that this is a case where the Commission has not made a rule governing a condition shown to exist, and hence the question was, as stated repeatedly by the trial judge, whether by reason of this condition the ladder was insecure or unsafe within the meaning of the statute. The judge correctly instructed the jury that the only ground on which it could find the ladder insecure was the presence of the round brace bar.

The judgment is affirmed.

Seawell, J.

We concur: Curtis, J. Waste, C. J. Shenk, J. Conrey, J. Langdon, J.

[fol. 310] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Thursday, February 27, 1936.

S. F. 15448

SCARLETT

v.

A., T. & SANTA FE RWY.

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside, and the cause ordered placed on the San Francisco Bank Calendar, for April, 1936, for argument.

Dated: Feb. 27, 1936.

Waste, C. J. Shenk, J. Langdon, J. Thompson, J.

[fol. 311] (Minute Order, San Francisco Session, April 7, 1936)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

S. F. 15448

SCARLETT

vs.

ATCHISON, TOPEKA AND SANTA FE RY.

Cause called for hearing on merits and argued by H. K. Lockwood on behalf of appellant and L. E. Goodman on behalf of respondent. Appellant 10 days, respondent 10 days and appellant 5 days for supplemental printed points and authorities to be filed; cause then to be submitted.

[fol. 312] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

S. F. No. 15448

SCARLETT

vs.

A., T. AND SANTA FE RWY., ETC.

By the COURT:

All of the briefs having been filed pursuant to an ordered entered herein April 7, 1936, cause submitted as of this date.

Dated May 11, 1936.

Waste, Chief Justice.

Filed May 11, 1936. B. Grant Taylor, Clerk, by W., S. F. Deputy.

[fol. 313] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Friday, August 7, 1936.

S. F. 15448

SCARLETT

vs.

ATCHISON, TOPEKA & SANTA FE RY.

By the COURT:

Judgment is affirmed.

[fol. 314] Filed Aug. 7, 1936. B. Grant Taylor, Clerk, By J., S. F. Deputy

S. F. No. 15448. In Bank.

August 7, 1936.

WILLIAM W. SCARLETT, Plaintiff and Respondent,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY (a Corporation), Defendant and Appellant

By the COURT:

In this case a rehearing was granted to give consideration to appellant's several contentions questioning the soundness of the holding of this court.

A further review of the cause leads us to adhere to the conclusions already announced and our former opinion is hereby adopted as a part of this decision. It reads:

[fol. 315] "Plaintiff recovered judgment against defendant Atchison Topeka and Santa Fe Railway, a corporation, for $18,000 damages for personal injuries received by him in the course of his employment by said defendant as a brakeman. Defendant appeals from the judgment.

"The accident took place on August 27, 1931, at Mormon, California. Plaintiff had been upon the top of the rear car [fol. 316] of a cut of freight cars in the course of his employment, and was descending the ladder on the side of the car when his foot slipped and he fell to the ground. He received serious injuries, including the fracture of bones of his left wrist. It became necessary to remove certain of the bones of the wrist, with the result that plaintiff has suffered a permanent disability to his left hand, wrist and arm, which prevents his continuance in employment as a railroad brakeman.

"The ladder from which plaintiff fell is located on the side of the car, within a few inches from the end of the car. Back of the ladder, in a diagonal position, is a round metal rod, which serves to brace the end and side of the car. Plaintiff attributed his fall to the presence of this diagonal brace rod. He testified that as he descended the ladder his foot came in contact with the diagonally placed

round brace rod, instead of the horizontal ladder rung, causing him to lose his footing and fall to the ground. At the time plaintiff fell, the train was moving at a speed of about two miles an hour. It is his contention that the presence of this round bar rendered the ladder insecure, in violation of provisions of the Federal Safety Appliance Act of 1910. (36 U. S. Stats. at L., p. 298, U. S. C. A., title 45, secs. 11-16.) Where an injury is proximately caused by a condition existing in violation of any of the several safety appliance acts of Congress, including the Boiler Inspection Act (36 U. S. at L., p. 913, U. S. C. A., title 45, secs. 23-34), [fol. 317] the carrier is absolutely liable therefor, although it is ignorant of the defect and has used ordinary care to maintain its equipment in the required condition. (St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 294; Baltimore & Ohio R. R. Co. v. Groeger, 266 U. S. 521, 527; Illinois Central R. R. Co. v. Williams, 242 U. S. 462, 466; Texas & Pacific Ry. v. Rigsby, 241 U. S. 33, 43; U. S. v. Chicago, St. P., M. & O. Ry., 43 Fed. (2d) 300, 302.) The effect of said acts is to substitute an absolute liability for the common-law liability based on negligence. Not only is the liability absolute, but by express statutory provision the defenses of assumption of risk and contributory negligence are eliminated. (27 U. S. Stats. at L., p. 532, U. S. C. A., title 45, sec. 7; 35 U. S. Stats. at L., p. 66, U. S. C. A., title 45, secs. 53 and 54; Great Northern Ry. Co. v. Donaldson, 246 U. S. 121; Texas & Pac. Ry. v. Rigsby, supra; Ballard v. Sacramento N. Ry., 126 Cal. App. 486, 490.) Where the action is not predicated upon a violation of safety appliance acts, but on common-law negligence not constituting a violation of said acts, the defense of assumption of risk is permitted, and as to contributory negligence the statute provides that damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee. (U. S. C. A., title 45, sec. 53; Erie R. Co. v. Lindquist, 27 Fed. (2d) 98.)

"In the instant case the plaintiff bases his claim to recover on a violation of the provisions of the Safety Appli- [fol. 318] ance Act of 1910 to the effect that 'all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards.' (36 U. S. Stats. at L., p. 298, U. S. C. A. title 45 sec. 11.) He relies solely on the presence of the round diagonally placed bar

behind the ladder, which, he contends, rendered it insecure in violation of the act. On the trial he expressly waived any rights of recovery he might have based on common-law negligence independently of the above-quoted provision of the Safety Appliance Act. Accordingly the trial court sustained plaintiff's objection to evidence by which defendant sought to show assumption of risk.

"By virtue of section 3 of the Safety Appliance Act of 1910, supra, the interstate commerce commission has authority to designate 'the number, dimensions, location, and manner of application of the appliances' provided for by the act. The carrier is subject to a penalty of $100 for permitting any car to be hauled on its line not equipped as provided in the act (sec. 4). By virtue of the authority vested in it by Congress, the commission has specified certain requirements for ladders, including a specification for clearance as follows: 'Minimum clearance of treads, two (2), preferably two and one-half (2½) inches.' It is admitted herein that there is a space of 2¾ inches between the outside of the round diagonal bar and the inside of the ladder rungs.

[fol. 319] "Defendant contends that in view of this 2¾ inches clearance it must be held as a matter of law that the ladder was 'secure'; that the interstate commerce commission is entrusted by congress with authority to determine the requirements for safety appliances, and an appliance cannot be held insecure or unsafe in a respect in which it fully complies with the commission's rules.

"Respondent contends that the rules of the commission merely establish minimum requirements; if an appliance fails to comply with a rule of the commission, it must as a matter of law be held insecure or unsafe, but it does not follow that because it conforms to the rule that it is safe or secure; the statute requires a secure ladder, meaning a safe ladder, and it is for the jury to determine whether a ladder conforming to rules of the commission is secure. Respondent further contends that if compliance with a rule as to a particular matter renders the appliance 'secure' as a matter of law in that regard, nevertheless where the insecurity lies in a detail as to which the commission has no rule, it is for the jury to say whether the appliance is secure. Applying this argument to the instant case, respondent contends that the rule of the commission providing for

a clearance of 2-2½ inches for ladders contemplates clearance between the flat side of the car and the ladder, and does not authorize the introduction into the clearance space [fol. 320] between car side and ladder (even though it is greater than 2½ inches) of a round bar standing out from the side of the car and diagonally placed behind the ladder in such manner as to create a hazard to employees in using it. It has been held that "secure" means more than firmly fastened; it means safe for use in the purpose for which it is intended. (Davis v. Reynolds, 280 Fed. 366.)

We are of the view that respondent can succeed herein only if the rule as to clearance was not intended to cover the situation shown by the facts herein. If the rule applies, it must be held that the ladder is "secure". Respondent's contention that the rules of the commission prescribe mere minimums, although it finds support in Western & A. R. R. v. Meister, 140 S. E. (Ga.) 905, is contrary to the weight of authority and to better reasoning. The commission has facilities to conduct expert investigation and inquiry as to safety appliances which a jury deciding a single case lacks. Under the act of 1910, the specifications of the commission 'shall remain as the *standards* of equipment to be used on all cars subject to the provisions of this Act'. In view of the fact that violation of the statutory duty to provide safe and secure equipment and appliances is attended with absolute liability, and not dependent on failure to exercise due care to provide safe equipment, as was the common-law liability, it is of importance to the carrier to know in an exact [fol. 321] manner what it can do to discharge this duty. The rules of the commission prescribe the 'standards' of equipment, and where the carrier has complied exactly with a rule of the commission, its equipment cannot be held insecure in that regard.

"In the standardization itself there is an element of safety. In Illinois Central R. Co. v. Williams, 242 U. S. 462, 466, the Supreme Court stated that it was the purpose of the safety appliance acts to make the appliances ultimately conform to a standard to be prescribed by the commission, in order that uniform appliances should be found in the same place by employees who work always in haste and often in darkness and storm.

"In Lancaster & Wight v. Allen, 217 S. W. (Texas) 1032, it was contended that the flange of a locomotive wheel had

become worn to such an extent that the locomotive was 'not in proper condition and safe to operate' under the Boiler Inspection Act. (36 U. S. Stats. at L., p. 913; 38 U. S. Stats. at L., p. 1192, U. S. C. A., title 45, secs. 23 et seq.). It was held that if the flanges had not become worn to the extent prescribed with particularity by a rule of the commission in defining defective flanges, the railroad could not be held guilty of negligence in that regard. To the same effect are: Lehigh V. N. E. R. Co. v. Smale, 19 Fed. (2d) 67; Mahutga v. Minneapolis, St. P. S. S. M. Ry. Co., 234 N. W. (Minn.) 474; Auschwitz v. Wabash Ry. Co., 178 N. E. (Ill.) 403. It might be that if the commission made a rule which [fol. 322] so palpably tended to endanger the safety of employees that reasonable minds could not differ as to its effect, it would not be binding. The authority vested in the commission is to make regulations which will promote safety. But it is not to be contemplated that the commission will abuse its authority.

This brings us to respondent's second contention, that the commission's rule as to 2-2½ inches clearance for ladders was not intended to govern the situation where the clearance space between car side and ladder, although greater than 2½ inches, contains a hazardous diagonally placed round brace rod. Where the commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the commission has failed to regulate a particular matter, that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail. By sections 3 and 4 of the act of 1910 (U. S. Stats. at L., p. 298), a penalty is provided for failure to comply with the act, and not only for violations of rules promulgated by the commission. This conclusion is fortified by decisions interpreting another provision of the act. Section 3 provided that the commission should make rules within six months, but that it might extend the period within which any car- [fol. 323] rier should comply with respect to equipment in service when the act was passed. It was held that although the commission might extend the time for compliance with its rules, there was a duty to supply 'secure' appliances from the effective date of the act, and the commission could

not extend the time for compliance with this mandate. (Illinois Central R. Co. v. Williams, 242 U. S. 462; Tyon v. Wabash Ry. Co., 232 S. W. 786.) As to injuries occurring before the rules became effective, the question was whether the appliance was 'secure'. The same question is now presented when there is a claim of insecurity as to a matter not regulated by rule of the commission. The act of 1910 became effective July 1, 1911. The commission extended the date for compliance with its rules to a date more than five years later.

"In Baltimore & O. R. Co. v. Groeger, 288 Fed. 321, the court said: 'While the Interstate Commerce Commission is authorized to make rules and orders in furtherance of the enforcement of this law (the Boiler Inspection Act) nevertheless its failure to make a rule or an order covering every defective condition or construction within the meaning of section 2 of the Boiler Inspection Act by no means relieves the carrier from complying with the provisions of that section.' This language is equally applicable to the Safety Appliance Act of 1910. The Boiler Inspection Act (36 U. S. Stats. at L., p. 913) requires the appliances subject thereto to be 'in proper condition and safe to operate in the service to which the same are put'. The Safety Appliance [fol. 324] Act of 1910 requires ladders to be 'secure', which has been interpreted to mean safe for the use to which they are to be put. (Davis v. Reynolds, supra.) The Supreme Court reversed the Groeger case for certain error in instructions (266 U. S. 521), but it expressly recognized that as the commission had not regulated completely the matter as to which it was claimed the equipment was defective, there was a question for the jury as to whether the boiler was in proper and safe condition. (See, also, Gerow v. Seaboard Airline Ry., 128 S. E. (N. C.) 345; Davis v. Reynolds, supra; Pennell v. Philadelphia, Reading Ry., 231 U. S. 675.)

"The jury viewed a freight car with a ladder of the construction shown in the instant case. Photographs of ladders of this type, and of other ladders appear in the record. We are of the view that the jury was justified in its decision that this bar constituted a hazard which rendered the ladder insecure, unless it must be held that the clearance rule of the commission legalizes the position of the bar.

"The distance from the side of the box car to the inside of the diagonal brace rod is 7/8 of an inch; the diameter

of the rod is 1⅛ inches; the distance from the outside of the diagonal brace rod to the inside of the rungs of the ladder is 2¾ inches. The rule of the commission is simply: "Minimum clearance of treads, two (2), preferably two and one-half (2½) inches." The rule of the commission contains no reference to bracing, which in some type is generally found on the side of freight cars at the end in a position behind the side ladder. On wooden cars a brace of [fol. 325] some type is needed to protect the car because the greatest strain and stress is at the ends of the car. Diagonal braces consisting of flat pieces of metal, several inches in width and bolted to the side of the car, and diagonally placed 'U' shaped metal braces, the bottom of the 'U' being bolted to the side of the car, are used by other railroads and were used by defendant until it adopted the round rod type of brace in 1929. The defendant is the only railroad using a brace of this precise type, and it has a large number of cars so braced in use. According to witnesses for defendant, braces of the flat or 'U' type may buckle in use, which renders them useless as a brace and reduces the clearance between car side and ladder, with the result that the car must be sent to the shop.

"The rules of the commission pertaining to ladders were adopted in 1911, including the clearance provision. The type of construction with the round rod brace bar was not used until 1929. It seems readily apparent from the photographs and testimony that the round brace rod constitutes a far greater hazard to safety than does the flat metal brace bolted to the car side. As to the relative safety of the 'U' type of brace, as compared with the round rod type used by defendant, the distinction as to safety is not so clear. The extent to which the 'U' type is in use does not appear. It should also be pointed out that the other types of diagonal braces, except one, as shown by photographs, also dif- [fol. 326] fered from the round rod type in that they ran from a point on the bottom line of the car side or car end diagonally to the top corner, whereas the round rod runs from a point on the bottom line of the side of the car to a point on the side line of the car side approximately midway between the top and bottom, and a second brace, of the flat type, then runs from the midway point diagonally to a point on the top line of the car side. This causes the round rod to pass under the ladder rung at a different angle, and

different position in relation to the ladder rungs, than the single brace bar, which may render the round rod a greater hazard than the other types of bracing.

"The Safety Appliance Acts are to be liberally construed for the purpose of relieving trainmen of danger. (U. S. v. Chicago St. P. M. & O. Ry. Co., 43 Fed. (2d) 300; Frye v. Chicago R. R. & P. Ry. Co., 195 N. W. (Minn.) 629.) A similar construction should be given to rules of the commission formulated under authority of these acts. In the light of this principle, we conclude that the clearance rule of the commission should not be construed as a legalization of the round rod type of brace in the space between car side and ladder, which creates a greater hazard than some, if not all, of the types of bracing generally in use when the commission's rule was adopted; that in such cases, even though there is a space of slightly more [fol. 327] than 2½ inches between the outside of the round bar and the inside of the ladder rungs, it is for the jury to say whether the ladder is secure within the meaning of the Safety Appliance Act of 1910.

"What we have here said is not to be understood as an approval or requirement of any particular type of construction. It is for the railroads and the interstate commerce commission to solve engineering problems. But where the commission has not made a rule as to a particular matter, it is for the jury to decide whether the appliance is 'secure'. Evidence of the use of diagonal bracing, although of a different type, by other roads, and testimony of certain of defendant's witnesses that they knew of no other accident attributed to the round rod, were before the jury for consideration. The fact that other roads had accepted defendant's cars of this type for movement over their lines, and the further fact that the commission had made no specific regulation as to these bars, although they had been in use since 1929, were circumstances to be weighed by the jury.

"A carrier is authorized to refuse any car of another line if it does not comply with the safety appliance acts, and if it accepts a car which violates those acts, it is absolutely liable for injury due to such violation. (27 U. S. Stats. at L. p. 531, U. S. C. A., Title 45, sec. 3; Tyon v. Wabash Ry. Co., 232 S. W. (Mo.) 786, 790.) But we are of the view that these several facts, although pertinent

for the consideration of the jury, do not compel the con-
[fol. 328] clusion that as a matter of law the ladder was 'secure' within the meaning of the statute. (Great Northern Ry. v. Donaldson, 246 U. S. 121, 128; U. S. v. Chicago, St. P. M. & O. Ry. Co., 43 Fed. (2d) 300, 315.)

"For the most part defendant's assignments of error in the giving or refusing of instructions are disposed of by what we have said above. After the court had instructed the jury, it returned to ask certain questions of the judge. It appears that the jury wished to know whether in view of the clearance rule quoted above, it was authorized to find for plaintiff notwithstanding there was a space of more than 2½ inches between the diagonal bar and the ladder rung. The question was not very clearly put, and the judge's answer, as well as certain remarks made by him during the course of the trial and in the instructions already given, contains statements which might indicate a misconception of the law to the effect that although the commission had made a rule in regard to a particular detail of construction, nevertheless it was for the jury to say whether an appliance which conformed to the rule was 'secure' in that regard. But the judge also said: 'Now any provision or any condition imposed by the Interstate Commerce Commission, a compliance with that you could not—if that was complied with, that couldn't raise the question of negligence because they have to follow that particular rule.' We are of the view that the remarks of the judge which may seem to be in conflict with the quoted statement do not constitute reversible error.

[fol. 329] "If this were a case where a rule of the commission regulated the matter under consideration, and liability depended on whether the facts showed compliance with said rule, it might well be held that the judge's statements constituted reversible error. But we have held that this is a case where the commission has not made a rule governing a condition shown to exist, and hence the question was, as stated repeatedly by the trial judge, whether by reason of this condition the ladder was insecure or unsafe within the meaning of the statute. The judge correctly instructed the jury that the only ground on which it could find the ladder insecure was the presence of the round brace bar."

[fol. 330] Appellant, in its petition for rehearing, suggests that the above holding confuses an action for statutory violation of a safety appliance act with an action for common law negligence.

To understand this contention it should be recalled that plaintiff claimed that in descending the side ladder of appellant's box car, he slipped upon a diagonal brace rod affixed to the side wall, back of the rungs of the ladder, which slip caused him to fall to the ground and suffer severe injuries. Upon trial of this action he waived any right of recovery for common law negligence and based his claim upon a violation of the provision of the Safety Appliance Act of 1910 to the effect that "all cars requiring secure ladders * * * shall be equipped with such ladders * * *." (36 U. S. Stats. at L., p. 298, U. S. C. A., title 45, sec. 11). He relied solely upon the presence of the round bar behind the ladder, contending that said bar rendered the ladder insecure, in violation of said act. The jury accepted this view and we have held that it was justified in its conclusion that the diagonal brace rod constituted a hazard making the ladder insecure, that is, unsafe for the use to which it was put.

Appellant contends that as the issues on the trial were narrowed to the question of violation of the safety appliance act, i. e., to the sole question of whether the safety appliance—the side ladder—was defective, the above holding is unsound because the offending member (the brace rod) was no part of the safety applicance (the side ladder). [fol. 331] Appellant states that the brace rod was an entirely separate device installed to add strength to the end of the box car and that if it was the cause of the injury to plaintiff, then his remedy was an action based on common law negligence, not an action for violation of the safety appliance act in the maintenance of an insecure ladder. Thus there arises a question not discussed in our former opinion, to-wit: Was the dangerous device (the brace rod) a part of the safety appliance (the side ladder)? In other words, what constitutes the side ladder of a railroad box car? Are the component parts of the side ladder merely the two uprights and the cross bars, or rungs? If that were the case, in order to render a ladder secure and safe for the purposes of its intended use, it would merely be necessary to see that the uprights and rungs were without

defect. For example, such a ladder might be so insecurely bolted to loose side boards of a box car as to practically wave in the breeze, yet under the limited view contended for by appellant, the ladder, having rungs and uprights without defect, would be "secure". The only logical conclusion is that the term "secure ladder" as used in the act and applied to a side ladder of a box car, includes security of the complete appliance as finally installed; that is, it refers to security of the rungs and uprights or front of the ladder, the bolts which hold it in place, that portion of the side wall of the car which serves as the back of the ladder and the clearance space behind and around the ladder [fol. 332] necessary to its safe use. The act contemplates not only that an appliance shall be without defect or secure as to its construction but also that it shall be secure in matters pertaining to its location, installation, maintenance, and intended use.

There is no confusion with respect to the alleged cause of plaintiff's injury. He does not claim to have been injured by a defective device other than the ladder, i. e., a defective brace rod. His sole and only claim is that there was inserted between the front and back of the ladder a slippery rod which rendered the ladder unsafe. The ladder itself was the appliance which was unsafe in use, not the brace rod. And the reason the ladder was insecure was that the round rod had been so inserted in back of it as to create a hazard, despite the existence of the clearance specified by rule. It is obvious that the injection of a foreign article which is no part of an appliance would be as likely to render the appliance insecure as a direct defect in the appliance itself. To borrow from an illustration of appellant's counsel, suppose there had been installed instead of a smooth rod, a rod with sharp pointed spikes protruding therefrom. Could it be said that the mere existing of the specified clearance between the pointed ends of the spikes and the rungs of the ladder, would meet the requirement to maintain a secure ladder? We are of the view that the jury in this case was justified in concluding that the round [fol. 333] rod as installed in the space between the front and back of this particular ladder rendered it insecure in violation of said safety appliance act.

We see no room for complaint on the ground that this holding has not been rendered in the light of practical rail-

road operation. The record shows plainly that many types of bracing other than the round rod installed in the manner here shown, are used by various railroads. Appellant's plea of the exigencies of the situation, in that re-equipment of its cars with a different type of bracing would work a great hardship upon it and necessitate the expenditure of a vast sum of money, of course relates to matters outside the record of this case. But even so, safety of employees, and not the financial problem, is the primary consideration. If a round diagonally-installed brace rod does constitute a dangerous trap and hazard in use of the side ladder, it should be eliminated. If it does not constitute a danger and a hazard, undoubtedly appellant may secure the promulgation of a rule by the interstate commerce commission which will protect it from future cases of this character. The extent of our holding here is that in the circumstances shown, there was a question for the jury as to whether the ladder herein was a "secure" ladder within the meaning of the statute. This decision does not hold that as a matter of the law ladders of the type shown in this case are not "secure" within the meaning of the statute. It merely holds that a question for the jury was presented.

The judgment is affirmed.

[fol. 334] REGISTER OF ACTIONS

San Francisco, Civil No. 15448

Contra Costa County, Hon. A. B. McKenzie, Judge

(1 Civ/9527)

WILLIAM W. SCARLETT, Plaintiff & Respondent,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY, a Corporation, Defendant & Appellant

For Resp: James F. Hoey, Martinez L. E. Goodman, L. H. Brownstone, Jr., Clifton Hildebrand, Lane Mortgage Bldg., Los Angeles.

For Aplt: Robert Brennan, Leo E. Sievert, H. K. Lockwood, Kerckhoff Bldg., Los Angeles; Hartley F. Peart, 111 Sutter St., S. F.

3/27/35. Judgment Reversed. 1st D. C. Div. 2.

5/27/35. Hearing Granted.

8/27/35. Ordered on Calendar Bank San Francisco Oct. 3, 1935.
10/3/35. Argued and submitted.
1/31/36. Judgment is affirmed. Seawell, J. We concur: Curtis, J., Waste, C. J., Shenk, J., Conrey, J., Langdon, J.
2/18/36. Filed Petition for Rehearing (Appellants).
2/27/36. Rehearing Granted. Judgment vacated and set aside and cause ordered placed on San Francisco Bank calendar April 1936, for argument.
2/27/36. Filed Answer to Petition for Rehearing.
3/10/36. Ordered on Calendar Bank San Francisco Apr. 7, 1936 (3/9/36).
4/7/36. Appellant 10, respondent 10, appellant 5 days for briefs; cause then to be submitted.
4/15/36. Filed Appellant's oral argument on Rehearing.
4/27/36. Filed Respondent's reply brief on Rehearing.
4/30/36. Filed Appellant's answer to Respondent's brief on rehearing.
5/11/36. Cause submitted.
8/7/36. By the Court: Judgment affirmed.
8/18/36. Filed application for order staying issuance of remittitur pending application to U. S. Supreme Court for writ of certiorari.
8/18/36. Filed bond for costs ($1,000.00).
8/18/36. Ordered issuance of remittitur be stayed until 10/25/36 or further order of this Court.

[fol. 335] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S. F. 15448

WILLIAM W. SCARLETT, Plaintiff and Respondent,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY (a Corporation), Defendant and Appellant

APPLICATION FOR ORDER

To the Honorable William H. Waste, Chief Justice, and to the Associate Justices of the Supreme Court of the State of California:

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant and appellant,

respectfully presents this its application for an order staying the execution and enforcement of the judgment herein and staying the issuance of the remittitur of this Court to enable this defendant and appellant to apply for and to obtain a Writ of Certiorari from the Supreme Court of the United States in the above entitled cause under the provisions of Section 350, Title 28, Volume 44 (Part 1) of the United States Statutes at Large, and in support thereof presents the following:

[fol. 336] That this defendant and appellant is now preparing a petition asking for a Writ of Certiorari from the Supreme Court of the United States directed to the Supreme Court of the State of California to review questions of law involved herein, under the provisions of Section 344, Title 28 of Volume 44 (Part 1) of the United States Statutes at Large (Judicial Code Section 237 amended).

That the questions involved in this case sought to be reviewed by the said Writ of Certiorari are:

(a) Whether a safety appliance defect may be predicated on the single fact that between the side ladder of a freight car and the side of the car there is a diagonal brace rod, the clearance between the rungs of the ladder and the brace rod being strictly in compliance with the orders of the Interstate Commerce Commission.

(b) Whether the court erred in submitting to the jury the question whether the side ladder of a freight car was "secure" when the uncontradicted evidence was that the same strictly complied with the orders and specifications of the Interstate Commerce Commission.

(c) Whether the court erred in denying appellant's proffered instruction that the safety appliance, conforming to [fol. 337] the orders and specifications of the Interstate Commerce Commission, was ipso facto proper and safe.

(d) Whether there is in the record sufficient evidence to support the verdict and judgment.

That the reasons relied on in applying for the issuance of a Writ of Certiorari are that, in the opinion of the counsel for defendant and appellant, this Court has erred in the application of the law to the facts in the case; that we believe the Court has failed to make the proper distinction between actions for negligence under the Employ-

ers' Liability Act and actions for an alleged defective safety appliance; that in the trial of this case counsel for the plaintiff and respondent abandoned the alleged cause of action for negligence under the Federal Employers' Liability Act and elected to seek recovery only upon the theory of a defective safety appliance; that plaintiff and respondent failed to prove a defective safety appliance; that the evidence is insufficient to support the verdict and judgment herein. That the defendant and appellant has hundreds of freight cars with equipment identical with that of the freight car involved in this case and that, if the law as announced by this Court is good, then this defendant and appellant has a tremendous potential liability in using these freight cars thus equipped.

[fol. 338] That there is attached hereto, marked Exhibit "A", and by this reference made a part hereof, a certified copy of a stipulation entered into between the parties to the above entitled action and filed in the Court below, whereby plaintiff and respondent waived a bond on appeal, and further stipulated for a stay of execution of the judgment for $18,000.00, pending the final determination of said appeal;

That your petitioner offers herewith a bond with good and sufficient surety in the sum of One Thousand (1,000.00) Dollars to cover all damages and costs which plaintiff and respondent herein may sustain by reason of the issuance of the order prayed for herein, if your petitioner fails to make application for such Writ of Certiorari to the Supreme Court of the United States within the time allowed by law therefor, or fails to obtain an order from said Supreme Court of the United States granting said Writ of Certiorari, or fails to secure a reversal in the Supreme Court of the United States of the judgment of this Court.

Respectfully submitted, Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant and Appellant, The Atchison, Topeka and Santa Fe Railway Company, a corporation.

[fol. 339] STATE OF CALIFORNIA,
County of Los Angeles, ss:

C. N. Stedman, being by me first duly sworn, deposes and says: that he is an officer, namely, Assistant to General Manager of the Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant and appellant in

the above entitled action; that he has read the foregoing Application for an Order Staying the Issuance of Remittitur and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

C. N. Stedman.

Subscribed and sworn to before me this 15th day of August, 1936. Nellie B. Passfield, Notary Public in and for said County and State. (Seal.)

[fol. 340] Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 15448

WILLIAM W. SCARLETT, Plaintiff and Respondent,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY (a Corporation), Defendant and Appellant

BOND FOR COSTS

Whereas, The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant and appellant in the above entitled cause, is about to apply to the Supreme Court of the United States for a Writ of Certiorari to review the judgment and decision of the Supreme Court of California in the above entitled cause filed herein on the 7th day of August, 1936,

Now, Therefore, in consideration of the premises and of the above entitled Supreme Court of California issuing its order staying the execution and enforcement of the judgment in the Superior Court of the State of California, in and for the County of Contra Costa, and staying the issuance of the remittitur herein, the undersigned, National Surety Corporation, a corporation, does hereby undertake and promise on the part of the appellant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, that said appellant will pay all damages and costs not ex-

ceeding One Thousand (1,000.00) Dollars, which respondent William W. Scarlett may sustain by reason of the issuance of said order, if said appellant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, [fol. 341] fails to make application to the Supreme Court of the United States for the issuance of Writ of Certiorari in the above entitled cause within the statutory time allowed therefor, or fails to obtain an order granting such Writ of Certiorari, or fails to secure a reversal of said judgment in the Supreme Court of the United States.

Dated at San Francisco, August 18, 1936.

National Surety Corporation, a Corporation, by C. E. Keagy, Its Attorney-in-Fact. (Seal.)

Approved as to form and sufficiency: William H. Waste, Chief Justice.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 18th day of August in the year one thousand nine hundred and 36, before me Ed. R. Abbott a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. E. Keagy known to me to be the duly authorized Attorney in Fact of National Surety Corporation, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Corporation, and the said C. E. Keagy acknowledged to me that he subscribed the name of National Surety Corporation thereto as principal, and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Ed. R. Abbott, Notary Public in and for said County and State. (Seal.)

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Sept. 6th, 1939.

Endorsed: Filed Aug. 18, 1936. B. Grant Taylor, Clerk, by G. K. W., S. F. Deputy.

[fol. 342] [Endorsed:] No. S. F. 15448. Dept. No. —. In the Supreme Court of the State of California. William

W. Scarlett, Plaintiff and Respondent, vs. Atchison, Topeka and Santa Fe Railway (a corporation), Defendant and Appellant. Bond for Costs. Filed Aug. 18, 1936. B. Grant Taylor, Clerk, by G. K. W., S. F. Deputy. Robert Brennan, Leo E. Sievert, H. K. Lockwood, Kerckhoff Building, Los Angeles, Calif., Attorneys for Deft. & Appellant.

[fol. 343] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Tuesday, August 18, 1936.

S. F. 15448

SCARLETT

vs.

ATCHISON, TOPEKA AND SANTA FE RY.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant and appellant herein, having filed its verified petition for an order of this court staying the execution and enforcement of the judgment herein, and staying the issuance of the remittitur herein, pending its application to the Supreme Court of the United States for a writ of certiorari in the above entitled cause, and said petitioner having presented to this Court a bond in the sum of One Thousand ($1,000.00) Dollars with good and sufficient surety, conditioned in accordance with the provisions of Section 8 (d) of the Act of Congress, February 13, 1925 (United States Code, Title 28, Sec. 350), and good cause appearing therefor,

It is hereby ordered that the issuance of the remittitur of this Court in the above entitled matter, and the execution and enforcement of the judgment in the Superior Court of the State of California, in and for the County of Contra Costa, be and the same is hereby stayed until the 25th day of October, 1936, or until the further order of this court.

Dated August 18, 1936.

William H. Waste, Chief Justice.

[fol. 344] AFFIDAVIT OF SERVICE BY MAIL, 1013a C. C. P.

Case No. 18553

STATE OF CALIFORNIA,
County of Los Angeles, ss:

L. W. Clarke, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 436 Kerckhoff Building, Los Angeles, California; that on the 24th day of May, 1934, affiant served the within Transcript on Appeal on the Trial Judge in said action, by placing a true copy thereof in an envelope addressed to the Clerk of Contra Costa County at the office address of said Clerk as follows: (Here quote from envelope name and address of addressee.) "Mr. S. C. Wells, County Clerk, Contra Costa County, Martinez, California." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the corporation by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

L. W. Clarke.

Subscribed and sworn to before me this 24th day of May, 1934. Nellie B. Passfield, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 345] Received copy of the within for the judge who tried the case, this — day of May, A. D. 1934.

Affidavit of service by mail attached inside.

S. C. Wells, County Clerk, by —— ——, Deputy.

Service of the within and receipt of a copy thereof, is hereby admitted this 24 day of May, A. D. 1934.

Werner, Martin & Hildebrand, & James F. Hoey, by James E. Martin, Attorneys for Respondent.

[fol. 346] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. No. 15448

WILLIAM W. SCARLETT, Plaintiff and Respondent,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY (a Corporation), Defendant and Appellant

CLERK'S CERTIFICATE

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify the foregoing volume containing 367 pages numbered from 1 to 367, inclusive, to be the Transcript of Record in the above entitled cause as presented by Petitioner and delivered to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the Order of Court granting hearing, Order of Court submitting cause, Order of Court affirming judgment, Opinion of Court, Order of Court vacating judgment, and ordering cause placed on Bank calendar, minute order on hearing, Order of Court submitting cause, Order of Court affirming judgment, Opinion of Court, copy of Register of [fol. 347] Actions, Application for Order staying execution and enforcement of judgment and issuance of remittitur, Bond for Costs, Order of Court staying execution and enforcement of judgment and issuance of remittitur, and a true and correct copy of Transcript on Appeal in the case.

In testimony whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of California this 14th day of September, in the year of our Lord, One Thousand Nine Hundred Thirty-Six.

B. Grant Taylor, Clerk of the Supreme Court of the State of California. (Seal Supreme Court of California.)

[fol. 348] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 7, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,045. California Supreme Court. Term No. 505. The Atchison, Topeka and Santa Fe Railway Company, petitioner, vs. William W. Scarlett. Petition for a writ of certiorari and exhibit thereto. Filed November 2, 1936. Term No. 505, O. T., 1936.

(8560-C)

FILE COPY

Office - Supreme Court, U. S
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Petitioner,

vs.

William W. Scarlett,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

ROBERT BRENNAN,
Kerckhoff Bldg., 6th and Main Sts., Los Angeles,
Attorney for Petitioner.

CHARLES H. WOODS,
H. K. LOCKWOOD,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. .....

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Petitioner,

vs.

William W. Scarlett,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Atchison, Topeka and Santa Fe Railway Company, a corporation, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled cause on August 7th, 1936.

Opinion Below.

The opinion of the Supreme Court of the State of California is reported in 60 Pac. (2d) 462.

Jurisdiction.

The judgment of the Supreme Court of the State of California was first entered on January 31, 1936. Then on February 27, 1936, the Court vacated and set aside said judgment, granted petitioner's petition for a rehearing, and ordered the cause placed on the calendar for argument. On April 7, 1936, the cause was finally submitted. Final judgment was entered on August 7, 1936.

The jurisdiction of this Court is invoked under volume 44 (part 1) of the United States Statutes at Large, title 28, section 344 (Judicial Code Sec. 237 amended).

Statutes Involved.

The pertinent statutes involved are the Federal Safety Appliance Act of 1910 (36 U. S. Statutes 298, U. S. C. A. title 45, sections 11 to 16); 27 U. S. Statutes 531, U. S. C. A. title 45, section 7; 35 U. S. Statutes 66, U. S. C. A. title 45, section 54.

Questions Presented.

The questions presented are:

(A) Whether the Supreme Court of the State of California erred in deciding that a safety appliance defect may be predicated on the single fact that between the side ladder of a freight car and the side of the car there was a diagonal brace rod, when the clearance between the rungs of the ladder and the brace rod was two and three-quarters (2¾) inches. The orders and specifications of the Interstate Commerce Commission did not require a clearance in excess of two and one-half (2½) inches.

(B) Whether the Supreme Court of California erred in sustaining the trial court in submitting to the jury the question whether the side ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace rod.

(C) Whether there was sufficient evidence to sustain the verdict in so far as it involves a finding that the ladder did not meet the requirements of the Safety Appliance Act.

Statement of the Case.

The respondent, a railroad brakeman in the employ of petitioner, while climbing down the side ladder of a freight car, slipped and fell to the ground. The freight car was moving at a speed of about two miles an hour and the movement of the car had nothing to do with the accident. The respondent testified that his fall was caused by his foot coming in contact with an anchor rod or brace rod behind the ladder, which caused his feet to leave the ladder and his hands to jerk from the hand-holds.

This anchor rod is a diagonal brace rod placed at an angle of 45 degrees across the lower corner of the freight car, between the side of the car and the side-ladder. There was a two and three-quarters inch clearance between the side-ladder and the nearest portion of the anchor rod. The orders and specifications of the Interstate Commerce Commission require a clearance of two inches, preferably two and one-half inches—(Roberts' Federal Liability of Carriers, page 2013). The function of the brace is to strengthen the end of the freight car. The petitioner had 7,000 freight cars identically equipped at the time of the accident.

The respondent based his cause of action wholly upon an alleged defective safety appliance, to-wit, the side ladder, expressly waiving any cause of action under the Employers' Liability Act, and claimed the presence of the anchor rod, notwithstanding the fact that the side ladder had a "clearance" greater than required by the Interstate Commerce Commission, raised a jury question as to whether the side-ladder was "secure" within the meaning of the statute.

The Supreme Court of the State of California, adopting respondent's theory of the case, sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace-rod between the side-ladder and the side of the freight car. The jury returned a verdict against petitioner for $18,000.

(The photograph opposite this page, although not an exhibit in the case, is a true picture and representation of the side-ladder and brace-rod involved.)

Reasons Why Writ of Certiorari Should Be Granted.

There are special and important reasons why the writ of certiorari should be granted. The Supreme Court of the State of California has decided a federal question of substance not theretofore determined by this Court and has decided it in a way not in accord with applicable decisions of the federal courts and other state courts.

On March 2, 1893, an Act of Congress was approved providing as follows:

> "Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it

9-11
3-31
9-6
9-2
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350
11

shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (Chapter 196, sec. 4, United States Statutes at Large, 27 Stat. 531.)

On April 15, 1910, there was approved another Act of Congress providing as follows:

"Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders; Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

"Sec. 3. That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission

> may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown * * *." (Chapter 160, Secs. 2 and 3, United States Statutes at Large, 36 Stat. 298, 299.)

On September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of section 3 of the above-named Act of Congress; and on March 13th, 1911, the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of certain safety appliances, among which was that of ladders on the sides of box and other house cars; that said order, after designating the number and dimensions of said ladders, provided that said ladders should have a minimum clearance of treads of two, preferably two and one-half inches. This order, so far as it relates to the particular safety appliance involved in this case, has never been amended or repealed. (Volume 2, Roberts' Federal Liability of Carriers, pp. 2010 to 2013.)

The record is without conflict that petitioner complied in every respect with the foregoing rules and specifications of the Interstate Commerce Commission then in force.

It is petitioner's contention that when a safety appliance "meets the tests and rules fixed by the Commission, it must, so far as carriers in interstate commerce are concerned, be esteemed proper and safe * * * thus the Commission sets the standard. * * * By setting the standard it imposes requirements. * * * It prescribes the rules and regulations by which fitness for service shall be determined." (*Atlantic Coast Line R. R. C. v. Napier et al.*, 272 U. S. 605, 71 L. Ed. 432, 2 Fed. (2d) 891.)

In a case almost identical with the case at bar—*Lehigh & N. E. R. Co. v. Smale,* 19 Fed. (2d) 67, where a brakeman's glove caught in a flag-holding device near the handhold, the Circuit Court of Appeals, Third Circuit, approved an instruction of the District Court wherein the court said

> "if the grab irons comply with the regulations of the Interstate Commerce Commission that is the end of your deliberations, and you would find a verdict for the defendant."

In *Fredericks v. Erie R. Co.,* 36 Fed. (2d) 716, the Circuit Court of Appeals, Second Circuit, in criticising the action of the District Court in permitting a jury to say whether the engine was defective because of the alleged unsafe location of a drain-cock, said:

> "* * * it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put."

In *Erie R. R. Co. v. Lindquist,* 27 Fed. (2d) 98, where a violation of the Boiler Inspection Act was claimed on account of a failure to equip or operate an engine and tender without a guard-chain which was not a required appliance, the Circuit Court of Appeals, Third Circuit, said:

> "But in all cases under these statutes that have come to our attention, performance is complete and liability thereunder ends when the carrier has observed their requirements by supplying and maintaining in operative condition the safety appliances required."

The state courts have consistently adhered to the same view. The Supreme Court of Illinois, in *Auschwitz v. Wabash Ry. Co.,* 178 N. E. 403, in a case involving a sill-step on an engine, constructed in accordance with the requirements of the Interstate Commerce Commission, said:

> "The decision of this ultimate fact rests solely with the Commission. A jury cannot be permitted to substitute its judgment in lieu of the judgment of the Commission upon whom the law places the responsibility for such determination. * * * We are of the opinion that, when the carrier complies with the requirements of the Interstate Commerce Commission, as it has done here, and therefore the Act of Congress, it cannot be found guilty of actionable negligence because the plaintiff or a jury might think ordinary care required something additional."

The court further said:

> "When the Commission has, by order, prescribed rules and specifications in regard thereto, all that is required of the carrier to fulfill its duty in that respect is a strict compliance therewith."

Again, in *Chicago, R. I. & P. Ry. Co. v. Benson,* 185 N. E. 244, the Supreme Court of Illinois held that a wire attached to the grab-iron and which caught the glove of a switchman, causing severe injuries, was no part of the grab-iron.

In *Pursglove v. Monongahela Ry. Co.,* 131 Atl. 477, the Supreme Court of Pennsylvania, in a case where a brakeman's coat caught on a bolt which fastened footboards to the locomotive, held that since there was no lack of compliance with the statutory duty, recovery could be had only if negligence had been established.

In *Mahutga v. Minneapolis, St. Paul etc. Ry. Co.,* 234 N. W. 474, a question arose as to use of certain cab curtains in a locomotive which had been standardized by the Interstate Commerce Commission. In deciding the case the court said:

> "Our construction of the decision and order of the Commission is that it intended to and did standardize the Wisconsin side curtain, here used, as suitable for all the purposes of the law, and it follows that a compliance therewith makes the locomotive 'safe to operate without unnecessary peril to life or limb.' The decision of this ultimate fact rests solely with the Commission."

In *Lancaster & Wright v. Allen,* 217 S. W. 1032, the Supreme Court of Texas decided a case where it appeared in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the Act of Congress, had made certain rules governing what condition of flanges on a locomotive wheel made it safe and what condition made it unsafe.

The trial court refused a special charge requested by plaintiffs in error as follows:

> "It appears in this case that Allen at the time he was killed was engaged in interstate commerce, and the rights of the plaintiffs are therefore governed by the act of Congress. It appears in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the act of Congress, had made certain rules governing what condition of flanges of a locomotive wheel makes it safe and what condition makes it unsafe. If you believe in this case that the flanges on the wheel were in accordance with said rules enacted by the Interstate Commerce Commission, then you cannot find that the railroad was negligent in that regard."

Regarding the above refused instruction the Supreme Court of Texas said: "In our opinion, the proper test was stated in the refused charge."

The California Supreme Court seeks to avoid the effect of these holdings in the federal and state courts by saying:

> "Where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the Commission has failed to regulate a particular matter that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail." (60 Pac. (2d) 462.)

It will be observed that the California court therefore assumes that the Commission has not made a rule in re-

gard to the particular matter involved here. The Court further said:

> "The ladder itself * * * was unsafe in use * * * and the reason it was insecure was that the round rod had been so inserted in back of it as to create a hazard, despite the existence of the clearance specified by rule * * * the clearance rule of the Commission should not be construed as a legalization of the round rod type of brace in the space between car side and ladder." (60 Pac. (2d) 462.)

Nowhere in the specifications of the Interstate Commerce Commission is there the slightest intimation that the "clearance" referred to means the space between the side ladder and the *surface* of the box car. The word "clearance" in car construction, as well as to all machinists, has a very definite meaning. Defined in Webster's International Dictionary as "the clear distance by which one object clears another, or the clear space between them," and by Funk and Wagnall's New Standard Dictionary as "the space by which a moving machine or part clears something," this is its accepted meaning in practical railroad construction. As applied to this case, it means the distance between the rungs of the ladder and the nearest fixed object, the brace-rod. (*Palomino v. Atchison etc. Ry. Co.* (Kansas Supreme Court, 138 Pac. 616. That has been the interpretation placed upon the term for years by all railroads. Every railroad has for years used some kind of a brace-rod between the side-ladder and the surface of the box car, and has provided for the clearance of the side-ladders with reference thereto.

The Supreme Court of California has erred in assuming that the Interstate Commerce Commission has not made a rule and order applicable to this case.

The Interstate Commerce Commission, in compliance with section 3 of the federal statute heretofore quoted, held its investigation and, after being fully advised, fixed the standards of construction of side-ladders on freight cars. The Commission's order is printed in full in Volume 2 of Roberts' Federal Liability of Carriers, pages 2013 and 2014. The Commission fixed the number, location, dimensions and manner of application of the safety appliances, including the ladders; it designated in detail the minimum length of ladder treads, the maximum spacing between the ladder treads, the location of the ladder tread with reference to the roof, the spacing of the ladder treads, the maximum distance from bottom tread of side ladder to top tread of sill step, the location of the end ladders, the minimum dimensions of hardwood treads, the minimum diameter of iron or steel treads; then comes the "*minimum clearance of treads two (2), preferably two and one-half (2½) inches.*" (Italics ours.) Following this, in the Commisison's order, are detailed specifications as to the location of the side ladders and further detailed specifications as to the manner of application.

It is obvious, therefore, that the Supreme Court of California was mistaken in its contention that no rule or order had been made by the Interstate Commerce Commission governing the clearance of the side ladder where a brace rod existed between the surface of the box car and the rungs of the ladder, and its decision is in fact out of harmony with the law that has been laid down in both the Federal and state courts that we have cited.

The petitioner, in constructing its freight cars, has been looking to the orders and specifications of the Interstate Commerce Commission for its guidance. If, after thus following out the rules and specifications of the Interstate Commerce Commission every jury in the land may "substitute its judgment in lieu of the judgment of the Commission upon whom the law places the responsibility for such determination" (*Mahutga v. M., St. P. etc. Ry. Co.*, 234 N. W. 474), then the uniformity of the safety appliances, which was the object of the federal statute, has been taken away.

The Supreme Court of California in thus holding that the presence of this diagonal brace rod raises a jury question as to whether the side-ladder is insecure, takes a stand contrary to the weight of authority in both the federal and state courts; and this is a federal question of substance not heretofore determined by the Supreme Court of the United States.

Petitioner contends, finally, that the mere fact the respondent claims to have fallen as a result of his foot coming in contact with the brace rod is not in and of itself sufficient to prove a defective safety appliance. In *Fryer v. St. Louis-San Francisco Railway Co.*, 63 S. W. (2d) 47, the Supreme Court of Missouri, said:

> "The mere fact that an injury has resulted from some condition of a locomotive or a part or appurtenance thereof does not itself show that the engine or its parts are not in proper condition and safe to operate," citing Watkins v. B. & M. R. R., 138 Atl. 315; Ford v. McAdoo, 131 N. E. 874, and Reeves v. Chicago, St. P. M. & O. Ry., 179 N. W. 689.

Conclusion.

It is respectfully submitted that this petition should be granted.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505.

The Atchison, Topeka and Santa Fe Railway Company (a corporation),
Petitioner,

vs.

William W. Scarlett,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is reported in 60 Pac. (2d) 462.

Grounds on Which Jurisdiction of This Court Is Invoked.

The judgment of the Supreme Court of the State of California was first entered on January 31, 1936. Then on February 27, 1936, the Court vacated and set aside said

judgment, granted petitioner's petition for a rehearing, and ordered the cause placed on the calendar for argument. On April 7, 1936, the cause was finally submitted. Final judgment was entered on August 7, 1936.

The jurisdiction of this Court is invoked under volume 44, (part 1) of the United States Statutes at Large, title 28, section 344. (Judicial Code, Sec. 237 amended.)

Statutes Involved.

The statutes involved are the Federal Safety Appliance Act of 1910 (36 U. S. Statutes 298, U. S. C. A. title 45, Sections 11 to 16); 27 U. S. Statutes 531, U. S. C. A. title 45, Section 7; 35 U. S. Statutes 66, U. S. C. A. title 45, Section 54.

Statement of the Case.

The respondent, a railroad brakeman in the employ of petitioner, while climbing down the side ladder of a freight car, fell to the ground. The freight car was moving at a speed of about two miles an hour and the movement of the car had nothing to do with the accident. The respondent testified that his fall was caused by his foot coming in contact with an anchor rod or brace rod behind the ladder, which caused his feet to leave the ladder and his hands to jerk from the hand-holds.

This anchor rod is a diagonal brace rod placed at an angle of 45 degrees across the lower corner of the freight car, between the side of the car and the side-ladder. There was a clearance of two and three-quarters inch between the side-ladder and the nearest portion of the anchor rod. The orders and specifications of the Interstate Commerce Commission require a clearance of two inches, preferably two and one-half inches—(Roberts' Federal Liability of Carriers, page 2013). The function of the brace is to strengthen the end of the freight car. The petitioner had 7,000 freight cars identically equipped at the time of the accident.

The respondent based his cause of action wholly upon an alleged defective safety appliance, to-wit, the side-ladder, expressly waiving any cause of action under the Employers' Liability Act, and claimed the presence of the anchor rod, notwithstanding the fact that the side ladder had a "clearance" greater than required by the Interstate Commerce Commission, raised a jury question as to whether the side-ladder was "secure" within the meaning of the statute.

The Supreme Court of the State of California, adopting respondent's theory of the case, sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace-rod between the side-ladder and the side of the freight car. The jury returned a verdict against petitioner for $18,000.

Specification of Errors to Be Urged.

The errors to be urged are:

A. The Supreme Court of the State of California erred in deciding that a safety appliance defect may be predicated on the single fact that between the side-ladder of a freight car and the side of the car there was a diagonal brace rod, when the clearance between the rungs of the ladder and the brace-rod was two and three-quarters inches, since the orders and specifications of the Interstate Commerce Commission did not require a clearance in excess of two and one-half inches.

B. The Supreme Court of the State of California erred in sustaining the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the aforesaid brace-rod.

C. The evidence was insufficient to sustain the verdict of the jury in that it involved an implied finding that the side-ladder did not meet the requirements of the Safety Appliance Act.

SUMMARY OF ARGUMENT.

The respondent abandoned all claim for common-law negligence at the trial and rested his case solely upon an alleged violation of the Safety Appliance Act.

The amendment to the Safety Appliance Act of 1893 which was approved in 1910 was the result of a general demand for safety appliances having uniform standards. In compliance with the amendment of 1910 the Interstate Commerce Commission, on March 11, 1911, promulgated its Safety Appliance Standards order, which has the force of law.

The brace-rod involved is a separate appliance having a distinct function and constitutes no part of the side-ladder. The purpose of the brace-rod is to strengthen the end of the freight car. It is separate and distinct from the safety appliance and is farther away therefrom than is required by the Safety Appliance Standards order of the Interstate Commerce Commission.

There is nothing new in principle about the brace-rod; there is hardly a freight car in the United States or Canada that does not have some brace-rod or obstruction between the side-ladder and the side of the freight car. The function of the different types of these brace-rods is the same, but the mechanism differs on different railroads. These are all designed to conform, however, to the clearance designated in the Commission's Safety Appliance Standards order. The fact that the respondent was injured while using the side-ladder is not significant.

While it is conceded that the Safety Appliance Act should be given a liberal construction, it is obvious that it should not receive an unreasonable construction. The rec-

ord shows no defect in the side-ladder. It was mechanically sound and secure and in strict accordance with the Commission's Safety Appliance Standards order. It is the petitioner's contention that since there was no defect shown to be in the Safety Appliance itself, the mere fact that the respondent was injured because his foot came in contact with a separate appliance, having no connection with the side-ladder, is not sufficient to prove a defective side-ladder.

The petitioner contends that the Safety Appliance is deemed proper when it fully complies with the Safety Appliance Standards order of the Interstate Commerce Commission. The respondent contends that there is no order of the Commission covering the situation. Our answer to that is that the Commission's Safety Appliance Standards order of March 13, 1911, does apply and governs the construction of the side-ladder and, since the side-ladder in question fully complied with this order, the evidence is insufficient to sustain a verdict for the respondent based upon a defective Safety Appliance. The side-ladder with the brace-rod underneath it has been used for years in safety and the accident involved in this case is the only accident that has ever been known to have been caused by the brace-rod.

It is not proper for the courts to lay down rules governing the construction of appliances, nor is it proper for a jury to be permitted to pass upon the adequacy of same. The Safety Appliance Act involved should be construed in accordance with practical railroad operation.

ARGUMENT.

I. Issues.

As stated by the Supreme Court of California "the plaintiff bases his claim to recover on a violation of the provisions of the Safety Appliance Act of 1910 (section 2) to the effect that 'all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards' * * * He relies solely on the presence of the round diagonally placed bar behind the ladder, which, he contends, rendered it insecure in violation of the act. On the trial he expressly waived any rights of recovery he might have based on common-law negligence independently of the above-quoted provision of the Safety Appliance Act." (60 Pac. (2d) 463.) [R. 122, 123.] The reason the respondent abandoned his claim for negligence under the Federal Employers' Liability Act was because petitioner proved through the testimony of many witnesses that the respondent had worked on hundreds of cars just like the car in question and had every opportunity to become thoroughly familiar with those cars and with every detail of their construction. [R. 51 to 53.] The evidence was, therefore, conclusive that if respondent had relied upon a claim of common-law negligence he assumed the risk of the dangers. The only issue involved, therefore, being the question whether the petitioner was maintaining a defective safety appliance, we are confronted with the fact that the Safety Appliance Act "is narrower in its scope and application than is the Federal Employers' Liability Act," *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S. W. (2d) 749.

II. History.

The annual reports of the Interstate Commerce Commission beginning in 1895 and running through until 1909 contain many expressions of disapproval of the fact that the law did not require uniformity of safety appliances. This need was met on April 14, 1910 when there was approved an act of Congress requiring secure ladders and also requiring that

> "within six months after the passage of the act *the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act and section four of the act of March second, eighteen hundred and ninety-three* (italics ours) and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the commission may deem proper, *and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission,* to be made after full hearing and for good cause shown; and *failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act.* * * *" (Italics ours.) (Vol. 36 U. S. Statutes at Large 298.)

Subsequently and on September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of sec. 3 of the above-named act of Congress; and on March 13th, 1911, the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of certain safety appliances, among which was that of ladders on the sides of box and other house cars; that said order, after designating the number and dimensions of said ladders, provided that said ladders should have a minimum clearance of treads of two, preferably two and one-half inches. This order, so far as it relates to the particular safety appliance involved in this case, has never been amended or repealed. (Volume 2, Roberts Federal Liability of Carriers, pages 2010 to 2013.)

This order of the Interstate Commerce Commission, which the Court may take judicial notice of (*Thompson v. Missouri Pacific R. Co.*, 15 Fed. (2d) 28), has the same force and effect as the statute itself.

Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729;

United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563;

Kansas City S. R. Co. v. United States, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1.

III. The Brace Rod Is a Separate Appliance Having a Distinct Function, and Constitutes No Part of the Side-Ladder.

Counsel for the respondent in their brief in opposition to our petition for writ of certiorari, made the statement that this diagonal brace rod was "a part of the ladder." (Pages 4 and 5, Brief for Respondent in Opposition to Petition for Writ of Certiorari.) The respondent is bound to take this position because, if the rod is not a part of the ladder, the ladder is not defective. That the rod is no part of the ladder is manifest from plaintiff's Exhibits 2 [R. 520], 3 [R. 521], and 5 [R. 523] and defendant's Exhibits 4 [R. 538], 5 [R. 539] and 6 [R. 540] and from the testimony.

Mr. Fred A. Isaacson, engineer of car construction of the Santa Fe Railway System, a witness, testified as follows:

> "That brace was put on there for the purpose of strengthening that car across the corner and provide means for tightening it and keeping it in shape, which supports the end and keeps it from bulging, thereby encroaching on any clearances that we might have between the two cars and causing an unsafe condition there." [R. pp. 63, 64.]

> "There is an enormous strain on ends of the cars due to the impact that the car gets in moving over the railroad. The coupling and uncoupling, the shift of commodities to get over the end and get jammed, endeavoring to shove the ends out. That is the worst thing that we have got to contend with in car construction, is to get an end of sufficient strength to withstand that impact." [R. pp. 63, 64, 68, 69.]

It is seen, therefore, that the brace-rod has a distinct function, to strengthen the end of the box-car. Having a function of its own and not being a part of the side-ladder, and being farther from the ladder than is required by the rules and specifications of the Interstate Commerce Commission, the brace-rod is distinctly a separate appliance. Whether it interfered in any way with the use of the side-ladder *was material only in considering whether the railway was guilty of common law negligence, which had been eliminated from the issues.*

There was nothing new and novel about this brace-rod. The uncontradicted evidence was that there is scarcely a freight car in the United States or Canada that does not have some projection of some sort underneath the side-ladder. [R. 76.] Looking at Respondent's Exhibits 3a, 3b, 3c, 3d and 3e [R. pp. 533 to 537] we see another type of freight car with diagonal brace-rod between the side-ladder and the side of the freight car. Respondent's Exhibits 5, 7 and 8 [R. pp. 539, 541, 542] show an end ladder with a large brace-rod between the ladder and the end of the freight car. These represent types of freight cars that have been in common use for years. Mr. Isaacson, the witness referred to, testified that the flat brace formerly used by the company was unsatisfactory "due to the buckling; that is, when it buckles it curls up like that (indicating). Sometimes that buckling occurs right underneath the ladder * * * for that reason we broke away from our practice sometime in 1924 and applied to our cars a round inch and one-eighth diagonal brace." [R. pp. 63 and 64.]

Mr. Michael Meehan, master car repairer for the Southern Pacific Company, a witness for the petitioner, testified that he was familiar with flat braces and that he

had observed such flat braces have a tendency to buckle and that when they do so they interfere with the use of the car. [R. pp. 173, 174.].

Obviously it was not intended that Congress or the courts should lay down rules as to all the mechanical contrivances about a freight car. Definite rules were made by the Interstate Commerce Commission as to the construction of ladders, but specific rules as to the construction of appliances, not within the class of safety appliances, were left for the carriers to construct according to mechanical needs. The only relation the diagonal brace rod has to the side-ladder involved is that of clearance. This clearance was designated by the Interstate Commerce Commission and was fully complied with. Pertinent to this inquiry our attention should be directed to the meaning of the word "clearance", as used, interpreted and applied in practical railroad operations. "Clearance", as defined in Webster's International Dictionary is "the distance by which one object clears another, or the clear space between them." The same word is defined by Funk & Wagnalls New Standard Dictionary as "the space by which a moving machine or part clears something", and the word "clear" is defined as "unbroken or unobstructed distance or space, as between two things where nothing intervenes." See *Palomino v. Atchison, Topeka & Santa Fe Railway Co.*, 91 Kansas 556, 138 Pac. 616. That has been the interpretation placed upon the term for years by all railroads. Every railroad has for years used some kind of a brace-rod between the side-ladder and the surface of the box-car, and has provided for the clearance of the side ladders with reference thereto. The Interstate Commerce Commission, after a full investigation of the subject, made an order

providing exactly how side ladders must be constructed and ordered the "minimum clearance of treads, two (2) preferably two and one-half (2½) inches." Now what did the Commission mean by "clearance"? Did it mean that the treads of the side-ladder must be two (2), preferably two and one-half (2½) inches from the side of the box-car? If they meant this, they surely would have said it. This order was for the benefit of and directed to the mechanical departments of the railroads. In this order the Commission *was speaking the language of machinists.* They were talking to men who looked at railroading in a practical way, and as machinists.

The mere fact that the employee is injured *while using* the ladder is no proof that the ladder is defective. (*Fryer v. St. Louis-San Francisco Ry. Co.*, 333 Mo. 740, 63 S. W. (2d) 47, at p. 53; *Zachritz v. St. Louis etc. Ry. Co.*, 336 Mo. 801, 81 S. W. (2d) 608.) The plaintiff in the case of *Reeves v. Chicago, St. P. M. & O. Ry. Co.*, 147 Minn. 114, 179 N. W. 689, was injured *while using* the step of an engine cab on account of the presence of a piece of coal, but the Supreme Court of Minnesota held that this did not prove a violation of the Federal Safety Appliance Act. The plaintiff in *Zachritz v. St. Louis-San Francisco Ry. Co., supra,* was injured *while using* the hand rail of the tender, because the hand rail "was as slick as grease," but the Supreme Court of Missouri again held that this was not a violation of the Safety Appliance Act.

In *Ford v. McAdoo etc.*, 231 N. Y. 155, 131 N. E. 874, the plaintiff's decedent was injured *while using* the ladder on the tender, but the Court of Appeals of New York held that the fact that the deceased's clothes got

caught on a hook that was located on the side of the tender and close to the grab handle was no proof of a defective appliance.

The plaintiff in the case of *Buschalewiski v. New York Cent. R. Co.,* 105 Misc. Rep. 541, 173 N. Y. Supp. 506, was injured *while using* automatic couplers, but the New York Court held that the defects complained of related to the condition and fastening of certain timbers which helped to secure the coupler and drawhead to the car, and that, consequently, this did not prove a defective safety appliance.

The plaintiff in *Slater v. Chicago, St. P., M. & O. Ry. Co.,* 146 Minn. 390, 178 N. W. 813, was injured *while using* a running board on the refrigerator car, but the Supreme Court of Minnesota held that the defect was not in the running board itself, but in the cover of the ice bunker which had been displaced so that it protruded upon the running board and that, as a consequence, the plaintiff failed to prove a defective safety appliance.

The plaintiff in *Chicago, R. I. & P. Ry. Co. v. Benson,* 352 Ill. 195, 185 N. E. 244, was injured *while using* a side ladder, the same as in this case, but the Supreme Court of Illinois held that the wire which was attached to the grab iron was no part of the safety appliance.

The plaintiff in *Ford v. N. Y., N. H. & H. Ry. Co.,* 54 Fed. (2d) 342, was injured *while using* the hand holds on the tender, but the Federal Court held that the grease on the hand holds, that caused the plaintiff to fall, was no part of the hand holds and did not constitute a defective safety appliance. The plaintiff in the case of *George v. Atchison Company,* 102 Kans. 774, 178 Pac. 403, was in-

jured *while using* automatic couplers, but the Supreme Court of Kansas held that the fact the cars involved were not equipped with "buffers" to mitigate the shock caused by the cars running together, did not prove a defective safety appliance, a buffer being a separate appliance.

The Supreme Court of California in its holding has made the railway responsible for the presence of this diagonal brace rod *as an absolute liability.* While it is not precisely analogous, the Court in *Ford v. N. Y., N. H. & H. Ry. Co.,* 54 Fed. (2d) 342, in considering a case involving grease on the hand-hold, said: "It was not the intent of Congress to make the railway company responsible for grease on the hand-hold, imposed as an absolute obligation." And, in *Slater v. St. P., M. & O. Ry. Co., supra,* where the plaintiff claimed a defective and insecure running board on a refrigerator car, the Court held that "the law so far as it relates to running boards deals solely with the mechanical construction and maintenance of secure running boards" and the fact that an ice bunker cover had been displaced so that it protruded upon the running board and interfered with its use did not constitute a defective safety appliance.

The mere fact that the respondent was injured while using the side-ladder constitutes no proof that the side-ladder was defective. In *Zachritz v. St. L. & San Francisco Ry., supra,* there was involved a case where the respondent took hold of the hand rail of a tender and attempted to step to the lower step leading to the cab and fell because the hand rail "was slick as grease" and "it

had oil on it." Notwithstanding the fact that the action was based upon the Boiler Inspection Act, which was much broader in its scope than the act in question here, the Court said:

> "In order for an injured party to recover under the Federal Acts, he must introduce substantial evidence of a defect or show that an appliance failed to function and by reason thereof he was injured. * * * The fact that respondent's hand slipped on the hand-hold was not evidence that the hand-hold as such failed to fulfill its proper function."

In *Ford v. McAdoo, etc.* (Court of Appeals of New York), *supra*; the plaintiff was a brakeman on a freight train of defendant. The pertinent facts were as follows:

> "At the left-hand corner of the tender on the outside was an opening leading into the water tank and above this was a hook upon which to hang a pail. A grabhandle was on the tender leading down from the deck of the engine. This hook in question was 23½ inches back from the grabiron on the left-hand side of the fender and 8 inches from the bottom of the tank and tender. * * *
>
> "After the accident there was found on this hook a small piece of blue cloth striped with white similar to the overalls worn by Ford.
>
> "The theory of the plaintiff was that Ford stepped off the engine before he reached the bridge, was caught by this hook, and dragged into the gussets of the bridge and thrown under the wheels of the car. This hook, it is said, was a dangerous contrivance rendering the engine and tender unsafe and improper within the meaning of the Boiler Inspection Act of Congress, as amended."

The Court said:

> "It (the hook) was as much a part of the construction as was the grabhandle or side of the tender. This device had been in use for years without causing any accident. No danger had ever arisen from it. It had served its purpose and caused no harm so far as the evidence in this case shows. * * *
>
> "It may be that opinions vary as to the best method of procuring water from the tank for the purposes needed. Later inventions may make former uses inadequate. When it comes, however, to a question of proper condition and safety under the Boiler Act, that mechanism which has been in constant use for years without causing injury must be considered proper and safe until some notice or occasion indicates its danger and insufficiency."

It should be noted here that Ovid L. Wright, general foreman of the Car Department of the Santa Fe Railway, having general supervision of all car repairs at the Richmond shops, and who examines approximately one thousand cars a month, testified in behalf of the petitioner:

> "I am familiar with the type of car involved in this lawsuit. These cars have been in constant use in California since 1929. * * * I have never heard of an accident attributable to or claimed to be attributable to this brace rod in any way other than the case involved here." [R. p. 94, fols. 268, 270; R. p. 94.]

While we concede that the courts should give a liberal interpretation to the Safety Appliance Acts, yet they must not give an unreasonable interpretation of it.

The case of *United States v. Chicago, S. P. M. & O. R. Co.*, 43 Fed. (2d) 300, was cited by the California Supreme Court in support of its statement that "the Safety Appliance Acts are to be liberally construed for the purpose of relieving trainmen of danger." We think that is correct, but the courts will not give a statute an unreasonable construction under the guise of making it liberal. *Pennell v. Philadelphia & R. R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, was a case where the plaintiff obtained a judgment against the railroad company on an alleged failure of the company to comply with the requirements of the Safety Appliance Act requiring automatic couplers. While the couplings *between the cars* were automatic and in full compliance with the Act, the coupler *between the engine and tender* was composed of a draw-bar and pin. The pin broke, resulting in the air hose breaking, thereby setting the brakes on the whole train, throwing plaintiff's intestate to the ground, causing his death. The court held that under the Act the word "tender" was not within the definition of the word "car", and reversed the case because the trial court had held, in seeking a "liberal" construction of the statute, that the word "tender" should be synonymous with the word "car".

In *George v. Atchison Company, supra*, the Supreme Court of Kansas was confronted with this sort of a case: Suit was brought against the company alleging a defective safety appliance which, in this case, was alleged to be the automatic coupler. The cars involved, it was alleged, were not equipped with "buffers" which was a contrivance to mitigate the shock caused by cars coming together. The plaintiff was operating the coupling device which device worked properly, but, on account of the fact

that these cars were not equipped with "buffers", the cars came too close together and struck him. The Supreme Court of Kansas said, in deciding the case, "the definitions of 'buffer' indicate a contrivance to mitigate the shock caused by cars coming together, rather than a Safety Appliance." Likewise, we say in the case at bar, paraphrasing the language of the Supreme Court of Kansas, the definitions of "brace-rod" and "anchor-rod" indicate contrivances to strengthen the end of box-cars, rather than a safety appliance.

In *Boehmer v. Pennsylvania R. R. Co.*, 252 U. S. 496, 64 L. Ed. 680, the Court was called upon to decide a case where the plaintiff sought damages against the railroad under the claim that the railroad had been negligent in using a freight car not equipped with hand-holds or grab-irons on *all four of the side corners* of the box-car. The car in question had hand-holds on the diagonally opposite corners. In deciding against the plaintiff the Supreme Court of the United States said "Section 4 must be intepreted and applied in view of practical railroad operations." Thus, we contend, that in the case at bar the Safety Appliance Act relating to side-ladders on freight cars "must be interpreted and applied in view of practical railroad operation." And the uncontradicted evidence in the case is that it has been the custom of all railroads at all times to have some sort of braces on the sides of box-cars between the side-ladder and the side of the car, and this has been acquiesced in by the Interstate Commerce Commission. "The custom of railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

In *Chesapeake & Ohio R. Co. v. Charlton,* 247 Fed. 34, the plaintiff sought judgment against the railroad under the Employers' Liability Act to recover damages on account of an alleged defective safety appliance which was the automatic coupler. The evidence was that the knuckle was open and that this caused a failure of the couplers to couple automatically. Plaintiff contended that the Safety Appliance Act required the railroad to equip all of its cars with couplers that would automatically couple by impact and that any failure of the cars to couple warranted the court in submitting the question to a jury with the view of having it determined whether such cars had been equipped in compliance with the statute. The court held that while it was the purpose of Congress to require all railroads to furnish an appliance to couple cars together which would couple automatically by impact, Congress did not thereby intend to provide that while the knuckles of a coupler by the motion of the train or otherwise should be closed this of itself would be sufficient to render the railroad liable for a failure to comply with the statute providing the appliance furnished was in perfect working order. Again we see that a "liberal construction" of the statute did not compel the court to make an unreasonable construction of it, but, rather, the court "interpreted and applied it in view of practical railroad operation." Thus we see the "liberal construction" of the statute should not lead to an unreasonable construction of it, and no construction of the statute can be upheld unless it is "interpreted and applied in view of practical railroad operation."

As we have said, the mere fact that the respondent fell while using the ladder fails to prove a defective safety appliance. As was said in *Zachritz v. St. L.-San Francisco Ry. Co., supra,*

> "The operation of a railroad is necessarily attended by some danger. It would be impossible to so equip the engines and cars as to eliminate all danger of employees being hurt. The Safety Appliance and Boiler Inspection Acts do not contemplate this to be done. As long as railroads are operated, employees, will, from time to time, fall from the cars and engines and otherwise be injured. That they do so does not of itself mean that the company has violated the Safety Appliance or Boiler Inspection Acts or that any one has been negligent."

And, in the case of *Fryer v. St. L.-San Francisco Ry. Co., supra,* the Supreme Court of Missouri, said:

> "The mere fact that an injury has resulted from some condition of a locomotive or a part or appurtenence thereof does not itself show that that the engine or its parts are not in proper condition and safe to operate."

To prove a defective Safety Appliance some defect must be shown in the safety appliance itself.

> "It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective." (*St. Louis Southwestern Ry. Co. v. Bounds,* 244 S. W. 1099.)

IV. The Safety Appliance Is Deemed Proper When It Fully Complies With the Orders and Specifications of the Interstate Commerce Commission.

It is contended that there is no rule of the Interstate Commerce Commission covering the situation here. The Supreme Court of California said,

> "We are of the view that respondent can succeed herein only if the rule as to clearance was not intended to cover the situation covered by the facts herein." (60 Pac. 2d. p. 464, column 2.)

And the court further said,

> "Where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the commission has failed to regulate a particular matter, that the carrier is relieved from the liability imposed by statute to supply an appliance which is secure and safe as to that detail." (60 Pac. 2d 465, column 1.)

We contend that the Interstate Commerce Commission has fixed a rule which exactly meets the situation here. The Interstate Commerce Commission, in compliance with section 3 of the Federal Statute, heretofore quoted, held its investigation and, after being fully advised, fixed the standards of construction of side-ladders on freight cars. The Commission's order is printed in full in volume 2 of Roberts' Federal Liability of Carriers, pages 2013 and 2014. The Commission fixed the number, location, dimensions and manner of application of the safety appliances, including the ladders; it designated in detail the minimum length of ladder treads, the maximum spacing between

the ladder treads, the location of the ladder tread with reference to the roof, the spacing of the ladder treads, the maximum distance from bottom tread of side-ladder to top tread of sill step, the location of the end ladders, the minimum dimensions of hardwood treads, the minimum diameter of iron or steel treads; then comes the "minimum clearance of treads two (2), preferably two and one-half (2½) inches." Following this, in the Commission's order, are detailed specifications as to the location of the side-ladders and further detailed specifications as to the manner of application.

It is obvious, therefore, that the Supreme Court of California was mistaken in its contention that no rule or order had been made by the Interstate Commerce Commission governing the situation here.

Furthermore, there is a presumption that the Interstate Commerce Commission approved this type of equipment, and that *clearance* should be interpreted as the railroads have long applied it. In *Fort Worth & D. C. Ry. Co. v. Smithers* (Texas), 272 S. W. 764, the court said:

> "In the absence of evidence to the contrary, it must be presumed that the appellants have provided such equipment as the law required, and that the *Interstate Commerce Commission, in the performance of its duty, had approved the equipment.*" (Italics ours.)

This petitioner is entitled to the legal presumption, therefore, that the Interstate Commerce Commission has acquiesced in the use of the equipment involved. Because we were entitled to this presumption we did not deem it necessary to prove the fact that the Interstate Commerce Commission has never raised a question or an objection to our use of this equipment. We say this not with any

purpose of going outside of the record in this case, because this evidence is actually in the case as a matter of legal presumption.

Not only has the Interstate Commerce Commission acquiesced in our use of this particular equipment, but in similar equipment which has been used ever since freight cars were made. The case of *Pennell v. Philadelphia & R. R. R. Co.*, 231 U. S. 675, 58 L. Ed. 430, cited by the Supreme Court of California in its opinion, held that "custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

Upon the Interstate Commerce Commission is imposed the duty of executing these statutes. Section 15 of Title 45 U. S. C. A., provides that

> "it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this chapter as to equipment of each car with safety appliances and all powers heretofore granted to said Commission are hereby extended to it for the purpose of such enforcement."

No ladders are safe and secure. Webster defines the word "secure" as "not exposed to danger," and "to relieve from exposure to danger," etc. Anyone familiar with the A, B, C's of railroading knows that this definition of "secure" cannot be literally followed. It is a matter of common knowledge that every person on either the side ladder or the end ladder of a freight car is exposed to dangers—dangers of the most glaring sort. Every man in using a side ladder or end ladder on a freight car may be exposed to a hundred dangers which can only be avoided

by the exercise of due care; in the first place he may be exposed to the danger of falling, which is a danger present in the use of any ladder. Again, he may be exposed to the dangers of impaired clearances and countless numbers of such places exist upon every railroad. Again, he may be exposed to the dangers of other freight cars being shunted or switched. He may be exposed also to the dangers of reckless automobile driving on public crossings and there are numerous cases where brakemen have been injured in this fashion. He may be exposed to danger by the presence of sleet on the ladder. Sleet makes the side-ladder insecure or unsafe for use; yet, we apprehend, it will not be contended that the safety appliance statute is violated if a brakeman slips upon a side-ladder coated with ice during a sleet storm. (*Slater v. Chicago, St. P. M. & O. Ry., supra.*)

The law does not require the employer to furnish the servant with the latest or best equipment or appliances, if it were to be conceded that any other appliance is any better than the brace-rod used in this case.

> "* * * It is a well-established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions or to discard appliances upon discovery of later improvements." (*Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 521, 69 L. Ed. 419.)

The fact that this precise type of brace rod on the car in question is not found on the freight cars of any other railroad is neither surprising nor significant. Engineering opinions differ as to all types of equipment. Seldom

have two railroads exactly the same type of any given equipment. Mechanical engineers, while they may agree upon the needs and the object sought, rarely agree as to methods and means. Our courts recognize this.

In *DeQueen & E. R. Co. v. Dye*, 187 Ark. 219, 58 S. W. (2d) 955, an experienced brakeman was injured while engaged in setting a brake on a box car. He brought suit to recover damages for his injury alleging violation of the Safety Appliance Act in that the defendant failed to equip the car with efficient hand-brakes. In deciding the case the Court used this significant language:

> "These cars and their equipment were manufactured with the Safety Appliance Act (45 U. S. C. A., Sec. 1 *et seq.*) and the rules of the Interstate Commerce Commission in mind, and were built and equipped so as to comply with the same. It is also to be remembered that immediately after the accident in question an examination of the car disclosed no worn or broken parts, no loose connection or other imperfections, and there were no structural defects. The question, therefore, of the efficiency of the equipment is a mechanical one. Since there are a number of mechanical questions arising in the determination of the proper construction of cars and their braking equipment, and as there are various types of brakes, each of which has its particular advocates—some preferring one and some another—and as inventions are frequently occurring and many devices provided to accomplish a like purpose, it is not proper for courts to lay down rules which will operate to restrict carriers in their choice of mechanical means by which their operations may be conducted. Nor should such matters be left to the varying opinions and verdicts of juries."

Some of the most pertinent cases we have found have to do with railroad locomotives. In citing these cases, however, it should be borne in mind that they are all based upon both the Boiler Inspection Act and Safety Appliance Acts. As previously noted, the Boiler Inspection Act is much broader than the Safety Appliance Act involved here. The Boiler Inspection Act provides that

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life, or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (45 U. S. C. A. p. 79, sec. 23.)

In *Auschwitz v. Wabash Railway Co.*, 346 Ill. 190, 178 N. E. 403, the Supreme Court of Illinois had before it for consideration the following facts:

> "The plaintiff charged that the defendant failed to maintain the tender and its parts in proper condition and safe to operate and that the step 'was bent, twisted and out of place and the same then and there improperly extended out beyond the outside of said locomotive and tender.'"

Mr. Justice Dunn, in the opinion, said:

> "The Federal Boiler Inspection Act * * * conferred on the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives in interstate commerce, * * *.
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> * * * * * * * *
>
> "The evidence shows, without dispute, that the sill-steps were, as originally constructed, in compliance with the order and specifications of the Interstate Commerce Commission; * * * It is not for the court to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition, nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe, and it may well be left to their officers and engineers to decide the engineering questions involved and the means to be used to that end, subject to the rules and specifications of the Interstate Commerce Commission. When the commission has, by order, prescribed rules and specifications in regard thereto, all that is required of the carrier to fulfill its duty in that respect is a strict compliance therewith."

In *Pursglove v. Monongahela Ry. Co.*, 285 Penna. 27, 131 Atl. 477, the Supreme Court of Pennsylvania was confronted with the following case:

> "Pursglove was employed by the defendant company as a yard brakeman. * * * The switching engine had attached in front a head log, and to it a footboard was held in place by brackets. Two nuts, measuring seven-eighths of an inch each, were used

as fasteners, leaving the thread end of the bolt extending beyond for a short distance, variously estimated at from one-half to two inches. Pursglove was standing on the right side, and stepped from the moving engine when it came opposite the office of the company, intending to secure a drink of water there, and then pass across to the train which was to be transferred. In descending from the footboard, his raincoat caught on the end of the protruding bolt, resulting in a fall."

In deciding the case the Court said:

"It may be noticed that the rules promulgated by the Interstate Commerce Commission, pursuant to the authority granted by the Safety Appliance Act, as amended (U. S. Comp. St., Secs. 8605-8623), directed, in the cases where the location of bolts was deemed necessary of regulation, that nuts attached to bolts shall be on the outside, evidently to provide for easier and more thorough inspection. Where locomotives are used in switching service, as here, it is expressly required that footboards shall be securely bolted to metal brackets, each of which shall be fastened to 'buffer-beam, end-sill or tank-frame by not less than two seven-eighths inch bolts' (2 Roberts, Federal Liability of Carriers, 1625), and the compliance with this duty imposed cannot be said to constitute negligence. * * * In the present case, there was no lack of compliance with a stautory duty, and recovery could be had only if negligence had been established, and it further appeared that the risk was not an ordinary one assumed by the plaintiff."

In *Fredericks v. Erie R. Co.*, 36 Fed. (2d) 716, the Circuit Court of Appeals. Second Circuit, of the state of New York, considered a suit brought for an injury to an employee while endeavoring to operate an appliance called a "petcock." After having passed on several questions, the Court said:

> "The plaintiff also claimed that the engine was defective because of the unsafe location of the drain cock, and the defendant requested the court to charge 'that the jury cannot find the engine defective on account of the location of the frost cock.' Instead of complying with this request, the court left the question of safe location to the jury, with some general remarks to the effect that it should not consider purely mechanical arrangement, but should determine whether the appliance was safe to operate, and proper and safe for the service in which it was to be used. When, as in this case, the evidence was overwhelming that the drain cock was located in the only place that it could be put and work properly, and that such location was of necessity uniformly used on lifting injectors by railroads in the territory where the plaintiff was hurt, it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put."

The above analysis is taken from *De Queen & E. R. Co. v. Dye, supra.*

The Supreme Court of California sustained the trial court in submitting to the jury the question whether the side-ladder of the freight car was "secure", when the claim of insecurity rested wholly upon the presence of the brace

rod. The trial court gave about a dozen separate instructins on this point. [R. pp. 72, 104, 105, 154, 155, 170, 171, 199-202, 210-212, 223, 238, 240, 241, 242, 244, 245.] We claim that these instructions were all in conflict with the principle set forth in the *Fredericks* case, *supra*. And with *Lehigh & N. E. R. Co. v. Smale,* 19 Fed. (2d) 67. Here the Circuit Court of Appeals, Third Circuit, decided a case involving these facts:

> "While the train was in motion, Smale, who was head brakeman, having in view aiding in a train movement in the line of his duty, went to the front of the engine in question and descended on steps fastened to the crossbeam at the front of the engine. In order to do so safely, it is obvious that he required support of handholds, and the requirements of the Interstate Commerce Commission in that regard are quoted in the margin.
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> "In compliance with its statutory duty, the railroad placed a wrought iron hand-hold of the proper thickness securely bolted with a cross-beam; but it was alleged, and around this the controversy centers, that such handhold did not have the clear minimum clearance length of the 14 inches required, in that at its top there was placed a flag-holding device, which presented a split at its outer end. When Smale, in endeavoring to make the descent, reached for this handhold, he placed his hand on the top of the handhold and over this flag-holding device, and his glove caught in the split. When he let loose the detention of the glove pulled him around, and he fell, and his leg was run over."

The case was submitted to a jury on the controverted fact as to whether the hand-hold had the clear minimum clearance required, and the United States District Court submitted the case to the jury in these words:

> "It was a combination handhold and flagstaff. There is testimony that it was equipment used on the New Jersey Central Railroad, Lackawanna & Western Railroad, as well as on the Lehigh & New England Railroad, the defendant in this suit. *If the grabiron complied with the regulations of the Interstate Commerce Commission, that is the end of your deliberations, and you would find a verdict for the defendant.*" (Italics ours.)

The case of *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 71 L. Ed. 432, was decided in 1926. Mr. Justice Brandeis, writing the opinion, said:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the commission does not extend to ordering the use or installation of equipment of any kind; Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 69 L. Ed. 419, 45 Sup. Ct. Rep. 169; and that Congress has definitely reserved that power to itself, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896; Atlantic Coast Line R. Co. v. Georgia, *supra;* United States v. Pennsylvania R.

Co., 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. Rep. 95. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. Ed. 276, P. U. R. 1917B, 1004, 37 Sup. Ct. Rep. 93. We think that power was conferred. *The duty of the commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the commission sets the standard. By setting the standard it imposes requirements.* (Italics ours.) The power to require specific devices was exercised before the Amendment of 1915, and has been extensively exercised since."

The case of *Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 521, 69 L. Ed. 419, was decided in 1925. Mr. Justice Butler delivered the opinion of the court. In this case respondent's deceased husband, a locomotive engineer, was killed by an explosion of the boiler. We quote from the opinion:

"The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs. This, however, does not relieve the defendant of the duty to have and keep its boilers safe for use, as required by the act. * * * It appears that among practical men experienced in such mat-

ters, there is a difference of opinion as to the usefulness of such plugs. If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was not for the jury. * * * The act required a condition which would permit use of the locomotive without unnecessary danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance, and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end."

In *Lancaster & Wright v. Allen* (110 Tex. 213, 217 S. W 1032), the facts were as follows:

> "Defendant in error alleged, and offered evidence to establish, that T. O. Allen's death resulted from defects due to the receivers' negligence, in a switch point on the receivers' track, and in a flange on a locomotive wheel, which caused the derailment of the locomotive on which T. O. Allen was discharging his duties to the receivers as fireman.
>
> "The defect in the flange of the locomotive wheel on which defendant in error relied in her pleading and proof was that it had become so worn as to cause the locomotive wheel and truck to climb the rail and derail the locomotive.
>
> "Plaintiffs in error duly answered, and introduced evidence to show that the switch point was not defective, and to show that the flange of the locomotive wheel was not worn to the extent required in order to be defective under the Safety Act of Congress and the rules prescribed thereunder by the Interstate Commerce Commission."

At the close of the evidence the trial court refused a special charge requested by plaintiffs in error as follows:

> "It appears in this case that Allen at the time he was killed was engaged in interstate commerce, and the rights of the plaintiffs are therefore governed by the act of Congress. It appears in the evidence that the Interstate Commerce Commission, acting by virtue of the power granted them by the act of Congress, had made certain rules governing what condition of flanges of a locomotive wheel makes it safe and what condition makes it unsafe. If you believe in this case that the flanges on the wheel were

in accordance with said rules enacted by the Interstate Commerce Commission, then you cannot find that the railroad was negligent in that regard."

In deciding the case the Court said:

"In our opinion, the proper test was stated in the refused charge. * * *

"The Interstate Commerce Commission approved rules and regulations prescribing with particularity the extent of wear on the flange of a locomotive wheel which renders it defective and which requires its discontinuance from service. * * *

The amended act made it obligatory on the receivers to conform to the rules and regulations of the Interstate Commerce Commission governing worn flanges on locomotive wheels."

In *Mahutga v. Minneapolis, St. Paul etc. Ry. Co.,* 182 Minn. 362, 234 N. W. 474, a question arose as to whether the railroad was using proper cab curtains on a locomotive. These cab curtains had been standardized by the Interstate Commerce Commission.

The Court held that where cab curtains were used in accordance with the standards authorized by the Interstate Commerce Commission it did not constitute negligence on the part of the railroad when it failed to have a "tie-back appliance" for the curtains. In deciding the case the Court said:

"Our construction of the decision and order of the commission is that it intended to and did standardize the Wisconsin side curtain, here used, as suitable for all the purposes of the law, and it follows that a compliance therewith makes the locomotive 'safe to operate without unnecessary peril to life or limb.'

> The decision of this ultimate fact rests solely with the commission. A jury cannot be permitted to substitute its judgment in lieu of the judgment of the commission upon whom the law places the responsibility for such determination."

The Safety Appliance Act involved must be interpreted in the light of practical railroad operation. The courts, *in applying the law to the other Saftey Appliance Acts,* have construed them in the light of practical railroad operation.

In the case of *Bochmer v. Penna. Ry. Co., supra,* the Court said, "Section 4" (which is the section of the Safety Appliance Act involved here) "must be interpreted and applied in view of practical railroad operations."

In the case of *Fort Worth & D. C. Ry. Co. v. Smithers, supra,* there was a suit instituted under the Federal Employers' Liability Act and the Safety Appliance Act, alleging that the plaintiff, a hostler-helper, was injured as the result of the failure of the ash pan to close without the necessity of plaintiff going under the engine, in violation of the safety appliance law, to-wit, the Federal Ash Pan Law. This law was as follows:

> "It shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive." (U. S. Stat. at Large, Vol. 35, p. 476, c. 225; U. S. Comp. Stats., Secs. 4624-4629.)

The plaintiff contended that in assuming a position upon the ground which would enable him to so close it he would be partly under the engine. The photographs which are

made exhibits to and part of the statement of facts show an employee operating the equipment while standing something over 2 feet from the rails, although about 18 inches above his head and extending out 5 or 6 inches over that side of his person next to the engine is seen what we take to be an extension of the floor of the cab or outer edge of the running board of the engine. The Court said:

> "It cannot be held, when the law is reasonably construed, that such employee is in any sense required to 'go under' the engine. . . . The evil which the law was intended to remedy was to require such a contrivance as would enable employees to open and close the ash pan without getting under the engine; that is, in such position between the rails or so close to the wheels or other parts of the engine that an unexpected movement would result in injury. . . ."

The New York court, in deciding a case involving automatic couplers, took the view that the case should be decided in the light of practical railroading. This was the case of *Buschalewiski v. New York Central R. Co., supra.* In this case the trouble with the freight car, for which it had been ordered to the repair shop by the inspector, was that a certain timber underneath the car, which was bolted to the frame of the car, had in some manner been split, and one or more of the bolts fastening to the framework of the car were missing and, when the car came in contact with the car ahead, owing to its weakened condition, gave way. It is to be noted that nothing was in fact wrong with this coupler proper. The defects related to the condition and fastening of certain timbers underneath the car, which helped to secure the coupler and drawhead to the car. The argument of counsel was that the coupler appliances were

defective and insecure, within the meaning of this act, even though the automatic coupling features were present. The Court said:

> "The statute should receive a fair interpretation to carry out its purposes; but, as was said in St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 295, 28 Sup. Ct. 621, 52 L. Ed. 1061:
>
> " 'Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible.' "

The case of *Baker v. Grace* (Court of Civil Appeals of Texas), 213 S. W. 299, held upon the authority of *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, and *United States v. C. B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, that an engine and two wrecking cars did not constitute a train within the Act of Congress, so as to make the railroad guilty of a violation of the law in failing to have the air-brakes on the cars coupled with the engine. A train, in practical railroad operations, has a definite meaning. To an ordinary layman an engine and two wrecking cars in a switching movement would look like a train. However, in practical railroad operation it is not a train and was so held by the courts.

The case of *United States v. Chicago, St. P. M. & O. Ry. Co.* (Circuit Court of Appeals, Eighth Circuit), *supra*, was an action brought to recover a penalty prescribed by the Safety Appliance Acts as extended by the Interstate Commerce Commission order of June 6, 1910. In this case the railroad was charged with a failure to equip its cars with proper air-brakes in that a passenger engine and tender, coupled to the rear of the train to assist

the head engine in pulling the train up-grade, was not equipped to comply with the federal statute. The Court said:

> "The pusher engine in the instant case was a part of the motive power of the train. Neither the wording nor the intent of the air-brake provisions of the Safety Appliance Act requires that an engine so used be included within the the designation 'cars.' This view is strengthened by the fact that the method of operation here assailed does not present any evil which the power brake provisions of the Safety Appliance Act was designed to remedy. It is significant, too, that this practice has been going on openly and unchallenged for many years, and when the government was operating this railroad the same practice prevailed."

Another illustration as to how the courts, in construing the act, attempt to construe it in the light of practical railroad operations, is the case of *Chesapeake & Ohio R. R. Co. v. Arrington,* 126 Va. 194, 101 S. E. 415. This case was reversed because the trial court refused to give the following instruction:

> "The court instructs the jury that side play in a coupler according to a standard in general and accepted use on railroads does not constitute a defect in a coupler, unless the jury further believe from the evidence that in one or both of the couplers involved in this case there was greater side play, or that the coupler or couplers were more out of line than was necessary for the safe operation of engine and car."

This decision was based upon the opinion of Mr. Justice Holmes in *Atlantic City Railroad Co. v. Parker,* 242 U. S. 59, 61 L. Ed. 150, in which Justice Holmes said, "some lateral play must be allowed to draw-heads."

Wherever the courts have been called upon to pass upon the other Safety Appliance Acts, they have taken the view that these statutes should be interpreted in view of practical railroad operation, and have so interpreted them.

In the light of the authorities we have quoted, we ask this Honorable Court to reverse the judgment of the Supreme Court of California.

ROBERT BRENNAN,
Attorney for Petitioner.

CHARLES H. WOODS,
H. K. LOCKWOOD,
Of Counsel.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 505.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

WILLIAM W. SCARLETT,

Respondent.

ANSWER TO RESPONDENT'S PETITION FOR A REHEARING.

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ANSWER TO RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

With all claims of common-law negligence voluntarily eliminated from the case by respondent and abandoned by him at the trial, his petition for rehearing is without substance, support or justification of any kind whatever.

The petition for rehearing and citation of authorities in support thereof merely repeat the matters and things heretofore pressed upon the attention of this Honorable Court by respondent and his counsel.

Counsels' seemingly intemperate language might be excused or put out of view if they could only remain con-

sistent. They now say, "Whether or not either the ladder or the rod * * * was defective is beside the question. No such issue was before this Court * * * whether or not the ladder was defective was entirely immaterial." (Petition for rehearing, pp. 2 and 3.) In the brief for respondent, at page 7, counsel speak of "unregulated defects", and on page 18 of "a failure of the Interstate Commerce Commission to make a rule or regulation concerning every defective condition," etc., and on page 20 counsel say "that the Interstate Commerce Commission, in fact, made no rule or regulation covering the defect in the ladder in this case, is not difficult to demonstrate." In these instances counsel seemed to think that it was decidedly material whether the ladder was defective.

The Supreme Court of California was of the same opinion; that Court said "he (respondent) does not claim to have been injured by a defective device other than the ladder, i. e., a defective brace rod" [R. p. 220]. This, respondent quotes on page 25 of his brief.

At any rate, it is only a play on words for counsel to contend that a ladder may not be defective and still be insecure.

Counsel now say "whether or not the brace rod was a part of the ladder, as such, is beside the question" (petition for rehearing, p. 3), counsel again shifting their position. In their brief for respondent counsel said "the diagonal brace rod was part of the ladder" (p. 6); and further said, "the diagonal brace rod as installed became a part of the ladder in its use" (brief for respondent, p. 23]; and also said, "no better argument, that the brace rod became a part of the ladder, can be urged than the reasoning of the Supreme Court of the State of California on

this subject, which we quote as follows: * * *" (brief for respondent, p. 23).

Counsel have misapprehended the holding of the Court in *Texas etc. v. Rigsby*, 241 U. S. 35, referred to by them on page 2 of the petition for rehearing; and in the case of *Davis v. Reynolds*, 280 Fed. 362, also cited on the same page, counsel have failed to state that the defect claimed in that case was in the "sill step" itself, "allowing the sill step on the engine to become slick from use," and not in some other appliances having an independent use; counsel also forget that the Boiler Inspection Act was involved in the *Davis* case.

Counsel contend that this Court has either overruled *Great Western v. Donaldson*, 246 U. S. 121, or announced a ruling contrary to the holding therein. We do not agree with this contention. If we correctly understand the *Donaldson* case the Court there held that there was "nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of Section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector." That is vastly different from the holding in the case of *Pennell v. Philadelphia & R. R. Co.*, 231 U. S. 675, where the Court said "that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the meaning of the statute."

Counsel, on page 5 of their petition for rehearing, take this Court to task for saying that the round type of brace rod involved here was adopted in 1924. The Court has the record for this conclusion. The witness Fred A. Isaacson testified: "We broke away from an old practice

some time in 1924 and applied to our cars a round inch and one-eighth diagonal brace." [R. p. 37.] Furthermore, it was conceded by counsel in oral argument that various types of brace rods, consisting of flat braces, wooden braces, and angle iron braces, all occupying substantially the same relative position with reference to the side-ladder, were in use at the time of and prior to the adoption of the Safety Appliance Standards Order of March 13, 1911. These were all of the same general type and for the same purpose as the brace rod involved in this controversy.

Counsels' reference to testimony of the witnesses John F. Struby, Clarence Craig and Theodore Shafer was unfortunate from their standpoint. (Petition for rehearing, p. 6.) None of these witnesses ever heard of an accident resulting from this brace rod and, although familiar with the rule that "every employee should report promptly to his foreman or some member of the safety committee or other proper person all unsafe conditions or practices," not one of said witnesses ever reported such a brace rod as constituting an unsafe condition or practice. [See R. pp. 125, 126 and 127.]

We respectfully submit that the Court reached the only possible conclusion under the facts and the law and that, therefore, a rehearing should be denied.

Dated: Los Angeles, California, April 19, 1937.

ROBERT BRENNAN,
HARLEY KELLOGG LOCKWOOD,
Attorneys for Petitioner The Atchison, Topeka and Santa Fe Railway Company, a Corporation.

CHARLES H. WOODS,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
Petitioner,

vs.

WILLIAM W. SCARLETT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It is unofficially reported in 60 Pac. (2d) 462.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on August 7, 1936 (R. 304). Petition for certiorari was filed on November 2, 1936, and served on respondent on November 7, 1936.

Jurisdiction, if present, must come from section 237, of the Judicial Code as amended; but is not present because there is no substantial Federal question.

STATUTES INVOLVED.

The statutes involved are:

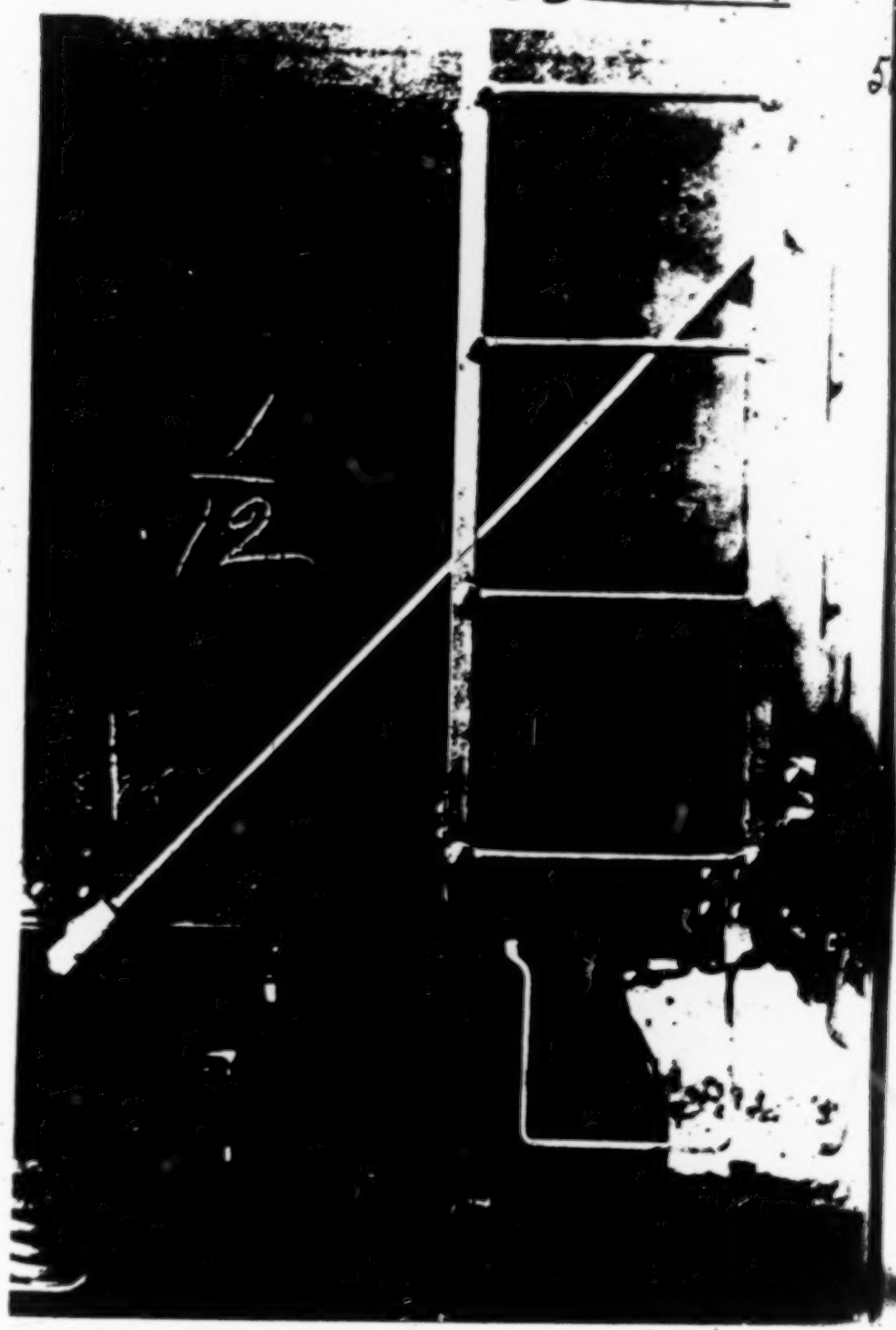
1. Federal Safety Appliance Act of 1910 (36 United States Statutes 298; U.S.C.A. Title 45, Sections 11 to 16); (27 United States Statutes 532; U.S.C.A. Title 45, Section 7); (35 United States Statutes 65; U.S.C.A. Title 45, Section 54).

2. Federal Employers' Liability Act, 35 United States Statutes 65; U.S.C.A. Title 45, Section 51.

QUESTION PRESENTED.

Was there any error in the decision of the Supreme Court of the State of California holding petitioner railway company responsible for damages caused by a defective safety appliance maintained in violation of the Safety Appliance Act, in a case where the safety appliance was shown to be defective in a respect *not* covered by any administrative regulations of the Interstate Commerce Commission?

Pltf. Exhibit
2
Scarlett vs G.T.J.F.Ry
1855-3



STATEMENT OF THE CASE.

Respondent, a railroad brakeman, in the employ of petitioner railway company, while both were engaged in interstate commerce, in climbing down the side ladder, on a freight car of petitioner's train, at night in the performance of his duties, fell from the ladder, by reason of his right foot coming in contact with a round slanting, diagonal brace rod, extending outward from the car wall and inserted between the side wall of the car and the rungs of the ladder and behind the same and suffered the injuries for which the jury awarded him a verdict. The distance from the side of the box car to the inside of the diagonal brace rod was ⅞ of an inch; the diameter of the brace rod was 1⅛ inches; the distance from the outside of the brace rod to the inside of the rungs of the ladder was 2¾ inches (R. 30, 31). The angle or slant of the brace rod from the perpendicular was 45 degrees. The brace rod was first introduced by petitioner in 1929 and petitioner is the *only* railroad using this type of rod behind side ladders (R. 62). The universal method of bracing cars by other railroad companies is by the use of flat braces not standing out into space and not obstructing free movement of the brakemen ascending and descending side ladders (R. 281). See upper brace on photograph opposite page 6 of petition.

For no logical reason, petitioner inserted opposite page 6 of its petition a photograph *admittedly not taken from the record.* Opposite this page we insert plaintiff's exhibit 2, being a photograph of the type of ladder in question (Opp. R. 280).

ARGUMENT.

NO FEDERAL QUESTION OF SUBSTANCE, NOT HERETOFORE DETERMINED BY THIS COURT, IS INVOLVED, AND THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN STRICT ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The California Supreme Court, in this case, held that the question of the insecurity or safety of the ladder in use, was properly submitted as a question of fact to the jury, for the reason that the evidence disclosed a violation of the Safety Appliance Act, in that the presence of the diagonal brace rod as a part of the ladder, constituted the same a trap and unsafe and insecure for use. No question of compliance with the Interstate Commerce Commission's requirements was involved. The question of the clearance between the rod and rungs of the ladder was not an issue. The presence of the diaganal brace rod as a part of the ladder was *not* a matter administratively regulated by the Interstate Commerce Commission.

This Court has held that, in the absence of such regulation, Section 2 of the Safety Appliance Act imposes a duty on railroad companies to maintain among other devices, secure and safe ladders, and that this duty extends along with the duty to comply with such administrative regulations as the Interstate Commerce Commission might promulgate to secure uniformity of practice.

Ill. Central R. R. v. Williams, 242 U. S. 462, 61 L. Ed. 437.

Other cases following the *Ill. Central R. R. v. Williams* case, supra, are:

B. & O. R. R. v. Groeger, 266 U. S. 521, 288 Fed. 321;

Gerow v. Seaboard Airlines, 128 S. E. 345; 189 N. C. 813;
Davis v. Reynolds, 280 Fed. 363;
Tyon v. Wabash Ry., 232 S. W. 786.

The decision of the California Supreme Court is not in conflict with any of the decisions cited by petitioner in its brief, as all of such decisions involve cases, where the issue was whether or not an administrative regulation of the Interstate Commerce Commission was complied with.

Respondent did not claim, nor was there any issue raised by the pleadings, or at the trial, that his injury was due to the failure on the part of the railroad company, to comply with any administrative regulation of the Interstate Commerce Commission, with respect to clearance.

The issue raised, and the issue submitted to the jury, was that the railroad company maintained an insecure or unsafe ladder, in violation of the Safety Appliance Act, by inserting in and as a part of the ladder, a device constituting a trap and making the ladder, thereby unsafe and insecure for use. This involved a matter of insecure or unsafe construction of the ladder in a respect *not* covered by any regulation of the Interstate Commerce Commission.

The California Supreme Court correctly held that the cause presented a pure question of fact, which was properly submitted to the jury for determination. Petitioner's sole claim therefore arises out of a simple question of fact properly submitted to the jury, and therefore there is no question of importance or substance calling for the consideration of this court.

Furthermore, that the decision of the California Supreme Court is not in accord with applicable decisions of the Federal courts and other state courts, even if true, is not a ground for certiorari.

CONCLUSION.

This case is not important as involving any question of law, which bespeaks the attention of this court under Subdivision 5-a of Rule 38, of this court. No Federal question of substance, not heretofore determined by this court, is involved, nor is the decision not in accord with applicable decisions of this court. The simple question of fact here involved was decided by the state court, clearly according to applicable decisions of this court. Nowhere does petitioner indicate (and clearly it cannot do so) that any new important substantial question has arisen in this simple case.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
November 20, 1936.

Respectfully submitted,
HERMAN A. BACHRACK,
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LOUIS E. GOODMAN,
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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
Petitioner,

vs.

WILLIAM W. SCARLETT,
Respondent.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It is unofficially reported in 60 Pac. (2d) 462. [Also R. 210.]

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered August 7, 1936. (R. 210.)

Petition for certiorari was filed November 2, 1936, and granted December 7, 1936.

Jurisdiction, if present, must come from Section 237 of the Judicial Code as amended.

STATUTES INVOLVED.

The statutes involved are:

1. Federal Safety Appliance Act of 1910 (36 United States Statutes 298; U.S.C.A. Title 45, Sections 11 to 16); (27 United States Statutes 532; U.S.C.A. Title 45, Section 7); (35 United States Statutes 65; U.S.C.A. Title 45, Section 54).

2. Federal Employers' Liability Act, 35 United States Statutes 65; U.S.C.A. Title 45, Section 51.

STATEMENT OF THE CASE.

Respondent, a railroad brakeman, in the employ of petitioner railway company, while both were engaged in interstate commerce, in climbing down the side ladder, on a freight car of petitioner's train, at night in the performance of his duties, fell from the ladder, by reason of his right foot coming in contact with a round slanting, diagonal brace rod, extending outward from the car wall and inserted between the side wall of the car and the rungs and uprights of the ladder and behind the same and suffered the injuries for which the jury awarded him a verdict. The distance from the side of the box car to the inside of the

diagonal brace rod was 7/8 of an inch; the diameter of the brace rod was 1 1/8 inches; the distance from the outside of the brace rod to the inside of the rungs of the ladder was 2 3/4 inches. (R. 16.) The rungs or treads of the ladder were attached to the outer surface of the stiles or uprights; while the distance from the treads to the brace rod was 2 3/4 inches, there was but a fraction of an inch between the inner surface of the stiles and the outer surface of the brace rod. [See Plaintiff's Exhibit 3, R: 174.) The angle or slant of the brace rod from the perpendicular was 45 degrees. The brace rod was first introduced by petitioner in 1929 and petitioner is the only railroad using this type of rod behind side ladders. (R. 36, 51.) It was admitted that there were many ways in which the bracing effect could be accomplished, without using the particular type of rod here in use. (R. 48.) The universal method of bracing cars by other railroad companies is by the use of flat braces not standing out into space and not obstructing free movement of the brakemen ascending and descending side ladders. (R. 49.) A number of witnesses, including experts, testified for respondent that the ladder as placed with the diagonal brace rod between the wall and the ladder uprights was unsafe and dangerous in use to the men using the same. (R. 118 to and including R. 127.) The jury, itself, inspected a freight car equipped with similar ladder and rod. (R. 129.) Photographs thereof were introduced in evidence. (Plaintiff's Exhibit 2, R. 173; Plaintiff's Exhibit 3, R. 174.) The primary purpose of the diagonal brace rod was to brace the car and it was designed for that purpose

alone. (R. 47.) No other factor was given consideration by the carrier except compliance with the Interstate Commerce Commission's requirements as to clearance of treads. (R. 48.)

SUMMARY OF ARGUMENT.

The Safety Appliance Act of 1910 here involved, was two fold in purpose. By Section 2 thereof, the carrier was required at all times thereafter to maintain certain secure and efficient equipment, including ladders, for use of employees. By Section 3 of the Act, Congress vested in the Interstate Commerce Commission, authority to prescribe rules and regulations, so as to insure uniformity of equipment. Section 3 was not intended to, nor did it, limit the general all embracing liability imposed by Section 2, to, at all times, provide and maintain secure and safe ladders and other equipment. Congress intended by Section 3, not to limit or circumscribe the liability imposed by Section 2, but to provide a further and additional element or measure of safety, to-wit, uniformity of equipment. In effect, Congress said to the carrier: "Not only is there a danger to your employees arising from insecure or unsafe equipment, but also there is existent an ever present danger arising from ladders and other equipment, which, although separately and individually secure, yet, by reason of placement, dimensions and space being different and varying upon the rolling stock, the employees required to use the same under all conditions of weather and time, con-

front danger because of uncertainty as to the type, dimensions and placement of affixation of equipment on cars." Therefore, said Congress, to the carrier, "there is imposed upon you, not only a primary and ever continuing duty to, at all times, provide safe and secure equipment, but in addition you will have the added liability of complying with such regulations and rules as the Interstate Commerce Commission may devise for uniformity of your equipment". It follows therefore that since 1910, the carrier had a two fold responsibility.

a. At all times, to provide safe equipment.

b. To provide uniformity of equipment as directed by the Interstate Commerce Commission.

For a violation of each of these duties, liability exists.

If a ladder, in and of itself, is not safe in any respect not covered by Commission regulation, the carrier is responsible.

If a ladder, in and of itself, is safe and secure, but violates the rule of the Commission as to uniformity, the carrier is responsible, and, a fortiori, if it is both unsafe and violative of a uniformity requirement, the carrier is responsible.

The issue here was not, whether the carrier violated any requirement of the Interstate Commerce Commission. The matter of obstruction in, about and in connection with the use of ladders, was not a matter covered by any regulation of the Commission. Under Section 2, the carrier being at all times required to

furnish and provide a safe and secure ladder, it follows, that violation of this primary duty entailed liability under the Act. The California Supreme Court correctly held this latter question was one of fact for the jury's determination under all the circumstances. Ample evidence justified the jury in finding the ladder unsafe.

The diagonal brace rod was part of the ladder, and hence if it was unsafe, the ladder was unsafe and the carrier is responsible.

The ladder consisted of more than the treads (or cross bars) and the uprights. The side wall of the car was also necessarily a part of the ladder. Hence any obstruction between the side wall and the uprights and treads, as was the diagonal brace rod here, making the ladder unsafe in use, constituted the ladder unsafe under the Act. Notwithstanding that the *purpose* of the carrier in inserting the brace rod as a part of the ladder was to strengthen the car, if its *effect* was to make the ladder unsafe and insecure in use, the ladder thereby became an insecure and unsafe ladder under the Act.

No presumption of approval by the Interstate Commerce Commission of this type of ladder with brace rod obstruction, arises by reason of failure of the Commission to enact regulations forbidding the same.

The regulations of the Interstate Commerce Commission with respect to ladders, read in their entirety, that is, both the language of the regulations and the plats and diagrams which are a part thereof, show that no obstructions shall exist between the rungs and

uprights of a ladder and the side wall of the cars. It therefore follows, either that there was a violation of the regulation in that regard or that the Commission did not cover the subject matter of such obstructions, in which event liability exists by virtue of violation of Section 2 of the Act.

ARGUMENT.

I.

THE LADDER WAS NOT SECURE, EVEN THOUGH COMPLYING WITH A COMMISSION REGULATION AS TO CLEARANCE OF TREADS FOR THE REASON THAT IN OTHER UNREGULATED ASPECTS, THE LADDER WAS INSECURE AND THUS VIOLATIVE OF THE ACT.

Petitioner has argued its case upon the theory that it escapes liability by a showing of compliance with the regulations of the Interstate Commerce Commission, even though it appear that the ladder was insecure and unsafe for use, in a respect, or respects, not covered by Interstate Commerce Commission regulation.

Petitioner rests this argument upon the theory that whatever duty or responsibility was created by the requirement of the Safety Appliance Act, as to secure appliances, is limited and circumscribed by such regulations as may be enacted by the Commission and therefore compliance with such regulations as were enacted in spite of the existence of unregulated defects in appliances, is a full discharge of the liability of the carrier under the Safety Appliance Act.

In effect, petitioner contends, that from the moment that any regulations were enacted by the Commission,

no matter how limited or fragmentary in character, thereafter the carrier need only show compliance therewith. If such be the case the Commission would in reality have the power of limiting and in fact of nullifying the essential purpose of Safety which was the essence of the Act. If such be the case, Congress, by delegating power to the Interstate Commerce Commission in accordance with Section 3 of the Act, has granted to the Commission the power to limit and in fact nullify the provisions of Section 2 of the Act.

This theory of petitioner is untenable. It violates the purpose and intent of Congress and the language of the Act and is not sustained by judicial authority. An investigation of the purpose and intent of the Congress in the passage of the Act of 1910, will in the first instance conclusively demonstrate the invalidity of petitioner's argument.

A. Reports of House Committee indicate a congressional intent directly opposite to that contended for by petitioner.

The Safety Appliance Act was first introduced in the 60th Congress, Second Session, passed by the House but not by the Senate. [H. R. 26725.] It was subsequently introduced in the 61st Congress, Second Session [H. R. 5702] and as a result of a conference committee report, it was adopted by both houses and signed by the President. As passed by the 61st Congress, Sections 2 and 3 were substantially the same as when introduced in the 60th Congress. The Committee member in charge of the bill at the 61st Congress, Mr. Townsend, referred to the Committee Report and Explanatory remarks by himself as com-

mittee member in charge of the bill, when offered in the 60th Congress, as being the motivating reasons for these sections of the Act, when introduced at the 61st Congress.

The Committee report and explanatory remarks of the Sponsor at the 60th Congress indicate the purpose and intent of both Sections 2 and 3 of the Act, namely, that Section 3 was not intended to either minimize, restrict or nullify the fundamental purpose of Section 2 of the Act. (See Congressional Record, 60th Congress, 2nd. Session, Vol. 43, page 2404.)

Mr. Townsend, the Committee member in charge of the bill, being questioned as to the purposes of the bill, the following colloquy ensued:

"Mr. Ellis, of Missouri. I want to call the gentleman's attention to the last proviso at the end of Section 3.

Mr. Townsend. Yes.

Mr. Ellis of Missouri, continuing: Conferring upon the Interstate Commerce Commission the power to modify the requirements of this section, by extending, the period and so forth.

Do we understand by that they would have the power to modify these requirements so as to change the appliances that might be prescribed by the measure?

Mr. Townsend. We make no provision as to any particular kind of appliance, only that they shall be safe. Now, the power of determining must be left with the Commission, otherwise, it would not be able to prescribe what might afterwards be found to be a

better device or method. Furthermore it should be discretional with it to give the railroads more time in which to equip their cars. That is but discretionary with the Commission.

Mr. Ellis of Missouri. I can readily see that an extension of time might be permitted but the question is, whether you leave the power in the Commission to really nullify the provisions of your bill.

Mr. Townsend. No."

Furthermore the Committee report in favor of the bill at the 61st Congress, contains language clearly indicating the same intent and purpose. [Cong. Record 61st Congress, 2nd. Session, Vol. 45, pages 160, 161, 4216, 4217; Senate Report No. 250.]

Mr. Townsend, the House Committee member in charge of the bill presenting his report, was questioned and made the following explanatory remarks:

"Mr. Townsend. It is a fact that while the law of 1893 provided for certain grab irons and hand holds on cars, it did not provide for any uniformity of their attachment to the cars. * * *

It is a fact that while there has been an effort on the part of railroad organizations and master car-builders associations to arrive at some kind of uniformity in the equipment of cars with these appliances, up to date they have not been able to agree. It is a fact that almost every freight train on almost every road contains cars equipped in several ways, so that the brakeman, switchman or other employees who have use for these appliances are not able to determine on a

dark night or under unusual circumstances just where these attachments are.

Mr. Hammond. Is it provided by this law that there shall be appliances of the same character or of the same make used by the various carriers?

Mr. Townsend. No sir, it does not; it provides that there shall be safety appliances *and* that they shall be attached in a uniform manner. To illustrate this provision, the sill step will be one of like character as all others employed, attached at the same place on the car.

Mr. Hammond. They (referring to the Commission) might attempt under this bill to designate the particular kind of appliance to be used. * * *

Mr. Townsend. I think not. It does not give the Commission any power to determine the kind of appliance, but only to determine upon the method of attachment of these safety appliances." [Cong. Record 61st Congress, 2nd Session, Vol. 45, pages 160-161.]

This Court has held that Reports of a Committee of the House or Senate "may be regarded as an exposition of a legislative intent, in a case where otherwise the meaning of the Statute is obscure" and that "this has been extended to include explanatory statements in the nature of a supplemental report made by a Committee member, in charge of a bill in course of passage."

Duplex Printing Press v. Deering, 254 U. S. 444; 65 L. ed. 349.

B. The language of the statute itself shows the same clear legislative intent as is found in the congressional proceedings.

Section 2 of the Act as passed by Congress in 1910 provides as follows:

> "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

Section 3 of the Act, provides as follows:

> "That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety three and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Com-

mission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; *and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act:* Provided, that the Interstate Commerce Commission may, upon the full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

The clause of Section 3 of the Act, to-wit: "Failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a *like* penalty as failure to comply with *any requirement of this Act*" (italics ours), subjecting the carrier to a *like* penalty for failure to comply with a regulation of the Interstate Commerce Commission, is irrefutably per-

suasive that Congress was intending to raise the regulations of the Commission to an equal dignity with the Act itself, but *not* to supercede the Act in any manner. In other words, Congress regarded the dangers resulting from lack of standardization and uniformity as being so important, as to require the infliction of a penalty for a violation of equal gravity with the penalty prescribed for violation of Section 2 itself. The matters covered, however, by Section 3, were in a different category or class and obviously the language of the Act itself therefore shows no desire on the part of the law makers, by Section 3, to limit, circumscribe or supercede the fundamental safety provision of Section 2.

C. The decisions of this Court and other judicial pronouncements are to the same effect.

This Court in *Ill. Central Ry. v. Williams*, 242 U. S. 463, 61 L. ed. 437, passed on the question as to whether or not, the order issued by the Interstate Commerce Commission on March 13, 1911, under the authority contained in Section 3 of the Act, suspended the provisions of Section 2 of the Act, during the interim allowed the carriers by the Commission for compliance with its regulations.

This Court held that Section 2 of the Act was in full force and effect, from the time of its enactment, irrespective of any delay granted by the Commission to the carriers to fulfill the requirements of the Commission's regulations.

> "The congressional purpose in enacting § 2 of the act is very plain. At the time the act was

passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure' and to enforce this duty by appropriately severe penalties. Chicago B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

It is equally clear that the purpose of the 3d section is to require that the safety appliances 'provided for by §2 of the act' shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission; that is, that they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their injury or death, when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service. * * *

This reading of the two sections makes them stand together as an expression of a consistent congressional purpose 'to promote the safety of employees and travelers on railroads' on and after July 1st, 1911, by requiring that the safety appliances described in § 2 of the act shall be secure and efficient from that date, and by requiring, as § 3 provides, that these appliances shall be brought

as speedily as may be to a uniform standard of location, size, and usefulness, to be prescribed by the Interstate Commerce Commission."

Ill. Cent. R. R. v. Williams, supra.

While the precise question before this Court in the *Williams* case, is not the precise question here involved, yet the *Williams* case decides the fundamental principle involved, namely, that Section 2 of the Act, from the date of its enactment, at all times, obligated the carriers to maintain safe appliances, irrespective of regulations made or not made by the Commission on the subject of uniformity or standardization. Obviously, if the sole issue raised in this case was an alleged default of the carrier in violation of a specific regulation of the Interstate Commerce Commission, the above prineiple would not be apropos; but where, as here, the issue is the violation of Section 2 of the Act, to-wit, the failure to maintain a safety appliance in a respect not covered by Commission regulation, the principle decided by this Court in the *Williams* case, supra, is applicable and determinative of this case. In the *Williams* case, Mr. Justice Clark, favorably commented upon a similar analysis of Sections 2 and 3 of the Act, made by the Supreme Courts of Minnesota and Iowa, in the cases respectively of *Coleman v. Ill. Central Ry.,* 132 Minn. 22, 155 N. W. 763; and *Cook v. Union Pacific Ry.,* 158 N. W. 521. The following language from *Coleman v. Ill. Central Ry.* is applicable:

"Congress intended that section 2 to be a part of the statute, and the clear language thereof can-

not be rejected, or held inoperative pending the installation of the standard of equipment to be ordered by the Commission without running counter to the main purpose of the act. The section must therefore stand, as a part of the statute, and be construed as imposing the duty upon railroads of maintaining their car equipment in secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve from, the duty to maintain present equipment in secure and safe condition."

Coleman v. Ill. Cent. R. R., supra.

The following language from *Cook v. Union Pacific* is applicable:

"Concede that they were not required to have standard handholds at the time of the accident, this is no defense to a charge that it failed to comply with the requirements of section 2 which required a handhold at the top of the ladder on the roof of the car, securely fastened. The record discloses, and the contention is, that it did have a handhold on the roof of the car at the top of the ladder, but that this handhold was not securely fastened as required by this section. The basis of the claim is that it had a handhold on the roof of the car at the top of the ladder, but that this handhold was insecure, and was the proximate cause of decedent's fall to his death. It was required to have such a handhold on the top of its cars from and after the 1st of July, 1911.

If it failed in this, it failed in its duty, although not required, at the time of the accident, to have it of standard make."

Cook v. Union Pacific, supra.

In passing upon a question arising under the Boiler Inspection Act, also a Safety Appliance Act, this Court in the case of *Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 523, 69 L. ed. 419, although reversing the District Court and the Circuit Court of Appeals upon other grounds (288 F. 321) approved the declaration of the Circuit Court of Appeals to the effect, that a failure of the Interstate Commerce Commission, to make a rule or regulation concerning every defective condition or construction within the meaning of Section 2 of the Boiler Inspection Act, did not relieve the carrier from complying with the provisions of that section itself, and, in that regard, this Court said:

"But we agree with the Circuit Court of Appeals, that under Section 2 of the Statute, there was sufficient evidence to sustain the verdict wholly apart from the broken stay bolts. This duty to have the boiler in a safe condition to operate, so that it could be used without unnecessary peril to its employees, was absolute and continuing. * * *

* * * The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. *There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs. This, however, does not re-*

lieve the defendant of the duty to have and keep its boilers safe for use, as required by the act."
Baltimore & O. R. Co. v. Groeger, 266 U. S. 529; 69 L. ed. 424.

In *Roberts Federal Liability of Carriers,* Vol. 2, 2nd edition, page 1035, the author states, as to the purpose of Congress in the enactment of Sections 2 and 3 of the Act,

> "the orders of the Interstate Commerce Commission, *supplement but do not displace* the statute from which their authority is derived. In fact, it would seem that appliances may be constructed and used in strict compliance with the requirements of an order of the Commission and still fall short of the standard fixed by the Statute. * * * Much less can it be said, that the omission of the Commission to indicate an approved mode of construction, for a given appliance, gives the carrier carte blanche to use such type of appliance as happens to suit its convenience. In such a case, on the contrary, the railroad is thrown back upon the primary general duty stated by the statute itself."

The California Supreme Court in the instant case, after reviewing the authoritiese stated:

> "where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the Commission has failed to regulate a particular matter, that the carrier is relieved

from the liability imposed by statute to supply an appliance which is secure and safe as to that detail."

Following the same principle see:

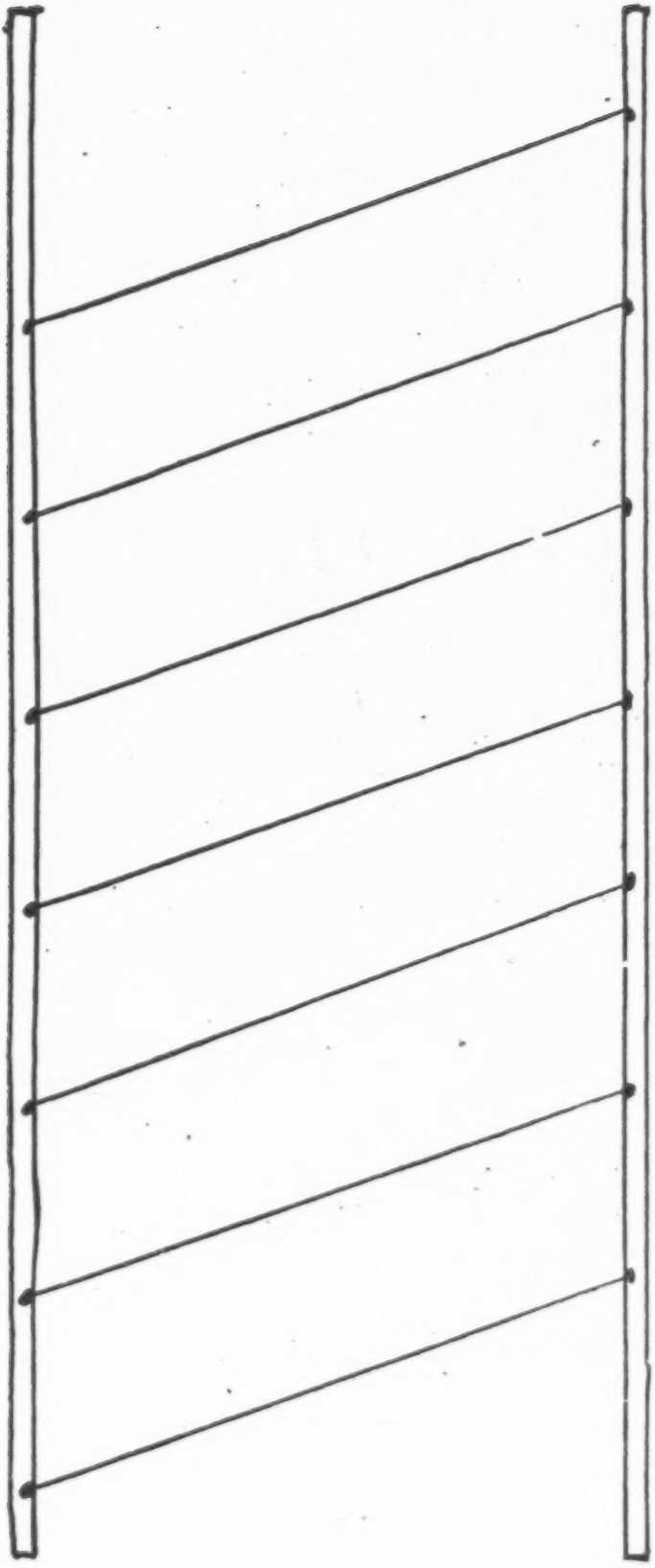
Gerow v. Seaboard Airline Ry., 128 S. E. 345;
Davis v. Reynolds, 280 Fed. 366.

That the Interstate Commerce Commission, in fact, made no rule or regulation, covering the defect in the ladder in this case, is not difficult to demonstrate.

The order of the Commission of March 13, 1911 confined itself with respect to side ladders, to the following considerations:

1. Length of treads.
2. Spacing between ladder treads.
3. Location of top ladder tread.
4. Uniformity of spacing between treads.
5. Distance from bottom tread of ladder to top tread of sill step.
6. Coincidence of end ladder treads with side ladder treads.
7. Dimensions of treads, i. e., diameter.
8. Clearance of treads.
9. Location of ladders on car.
10. Manner of affixation, as to bolts and rivets.

The foregoing subject matters of regulation obviously resulted from the requirement of uniformity and standardization. Clearly there are other important items involved in ladder construction, not concerned



with the question or problem of uniformity, not covered by the regulations and which can and do involve insecurity and danger to employees.

Many such examples can be given. In the first place, the particular brace rod here involved. Again by way of example, the regulations do not prescribe the material to be used in the construction of the treads or stiles. Again, no regulation as to the nature, type or condition of the wall to which the ladder is affixed. Again, no requirement that the treads of the ladder should be horizontal. Would a ladder wherein the treads were constructed of *glass* be *secure* under the terms of the Act? If compliance with the regulations is the sole test, it would be. Would a ladder affixed to a rotten and worm-eaten side wall of a car be secure? Obviously it would not, even though complying with the uniformity requirements of the Commission.

Opposite this page, we present a rough drawing of the uprights and treads of a ladder. It conforms in every respect to the requirements of the Commission. Assume that it has the proper length of tread, uniform spacing between the treads, proper diameter of treads, proper clearance of treads, and is properly located and affixed to the side wall of the car. Yet, because the treads are not horizontal (which is *not* required by the Commission) the ladder is obviously an insecure appliance, and would present untold danger to every brakeman of the Santa Fe R. R. Co. How could a brakeman go up and down a ladder affording such insecure footing? Yet in effect, the so-called diagonal brace rod here involved, presents exactly the

same type of danger as would confront a brakeman attempting to use the ladder in the diagram. Added to which is the additional demerit of lack of uniformity, which is the fundamental motive underlying the Commission's regulations.

The majority of petitioner's citations are from cases in which the sole *fact at issue* (not the case here), was whether or not the appliance in question conformed to the rules and regulations of the Commission and therefore the full test to be applied was the rule or regulation itself. This is particularly true with respect to the case of *Ford v. N. Y. and N. H. and H. R. R.*, 54 Fed. (2d) 342, especially relied upon by petitioner.

Respondent therefore respectfully contends that the language of the Act itself, the intention of Congress as found in its records, and the decisions of this and other courts, completely establish the principle that from and after the passage of the Safety Appliance Act in 1910, at all times, there rested upon the carrier, a full and continuing duty to provide safe appliances and further that the failure or omission of the Interstate Commerce Commission under the authority of Section 3 of the Act to provide regulations, concerning any specific device, with respect to its uniformity or standardization, has never provided any excuse for failure of the carrier to comply with the fundamental duty imposed by Section 2.

II.

THE DIAGONAL BRACE ROD AS INSTALLED, BECAME A PART OF THE LADDER IN ITS USE AND RENDERED THE LADDER INSECURE IN VIOLATION OF THE SAFETY APPLIANCE ACT.

Petitioner contends that the diagonal brace rod is not a part of the ladder, that it was installed for purposes of bracing, that it has no connection with the ladder, and that therefore, even though it would create danger for employees, respondent lacked right in this action for the reason that any claim of respondent would rest upon the ground of negligence of the carrier, not an issue here, and hence no right of action for violation of the Safety Appliance Act.

This contention will not stand analysis. The Interstate Commerce Commission's regulations re ladders were adopted in 1911. Petitioner installed the diagonal brace rod eighteen years thereafter in 1929. No other railroad in the United States has ever, at any time, used that type of rod. Petitioner's designer admitted no other factor, except that of bracing the car, was given consideration in adopting and installing the rod. Can it be logically contended that a carrier may install a device designed for another purpose, between the side wall of a freight car and the stiles of a side ladder and confine its consideration solely and entirely to whether or not it thereby obtains added bracing results for the car? No better argument that the brace rod became a part of the ladder, can be urged than the reasoning of the Supreme Court of the State of California on this subject, which we quote as follows:

"Appellant contends that as the issues on the trial were narrowed to the question of violation of the safety appliance act, i. e., to the sole question of whether the safety appliance—the side ladder—was defective, the above holding is unsound because the offending member (the brace rod) was no part of the safety appliance (the side ladder). Appellant states that the brace rod was an entirely separate device installed to add strength to the end of the box car and that if it was the cause of the injury to plaintiff, then his remedy was an action based on common law negligence, not an action for violation of the safety appliance act in the maintenance of an insecure ladder. Thus there arises a question not discussed in our former opinion, to-wit: Was the dangerous device (the brace rod) a part of the safety appliance (the side ladder)? In other words, what constitutes the side ladder of a railroad box car? Are the component parts of the side ladder merely the two uprights and the cross bars, or rungs? If that were the case, in order to render a ladder secure and safe for the purposes of its intended use, it would merely be necessary to see that the uprights and rungs were without defect. For example, such a ladder might be so insecurely bolted to loose side boards of a box car as to practically waive in the breeze yet under the limited view contended for by appellant, the ladder, having rungs and uprights without defect, would be 'secure'. The only logical conclusion is that the term 'secure ladder' as used in the act and applied to a side ladder of a box car, includes security of the complete appliance as finally installed; that is, it refers to security of the rungs and uprights or front of the

ladder, the bolts which hold it in place, that portion of the side wall of the car which serves as the back of the ladder and the clearance space behind and around the ladder necessary to its safe use. The act contemplates not only that an appliance shall be without defect or secure as to its construction but also that it shall be secure in matters pertaining to its location, installation, maintenance and intended use.

There is no confusion with respect to the alleged cause of plaintiff's injury. He does not claim to have been injured by a defective device other than the ladder, i. e., a defective brace. His sole and only claim is that there was inserted between the front and back of the ladder a slippery rod which rendered the ladder unsafe. The ladder itself was the appliance which was unsafe in use, not the brace rod. And the reason the ladder was insecure was that the round rod had been so inserted in back of it as to create a hazard, despite the existence of the clearance specified by rule. It is obvious that the injection of a foreign article which is no part of an appliance would be as likely to render the appliance insecure as a direct defect in the appliance itself. To borrow from an illustration of appellant's counsel, suppose there had been installed instead of a smooth rod, a rod with sharp pointed spikes protruding therefrom. Could it be said that the mere existing of the specified clearance between the pointed ends of the spikes and the rungs of the ladder, would meet the requirement to maintain a secure ladder? We are of the view that the jury in this case was justified in concluding that the round rod as installed in the space between the front and back of this

particular ladder rendered it insecure in violation of said safety appliance act."

Scarlett v. Atchison, etc., 60 Pac. (2d) 462. [R. 210.]

Furthermore, it must be kept in mind that the side ladder of a freight car is not movable. It is not extended in thin air. It is a part, and a component part, of the side wall of the car. Employees must use it exactly as it is, bolted and fastened to the wall of the car, with the wall of the car serving as the back of the ladder. It cannot be moved from place to place and adjusted to serve the needs of the employee called upon to make use of it. The employee must ascend and descend the ladder in all phases of railroad operations. Every element making up and being a part of the ladder in its use by employees must be secure. Any part or element of a ladder in its use, which is insecure, necessarily makes the entire ladder insecure. A ladder cannot be safe and secure in one of its parts and insecure in another without making the entire device dangerous and insecure for use.

This Court, as well as other Federal and State Courts, has followed the rule, that a failure *in use* is proof of defect.

Swinson v. Chicago, St. Paul, Minn. R. R., 294 U. S. 259; 79 L. ed. 1041;

Minn. R. R. v. Gotschall, 244 U. S. 66;

Louisville & Nashville v. Layton, 243 U. S. 617;

Davis v. Reynolds, supra;

Didinger v. Penn. R. R., 39 Fed. (2d) 798;

Phila. R. R. v. Auchenback, 16 Fed. (2d) 550;
B. & O. v. Metzler, 143 N. E. 707;
McDonald v. Great Northern R. R., 207 N. W. 194;
Frye v. Chicago R. R., 195 N. W. 629.

The record contains ample evidence in support of the finding of the jury that this ladder was in fact insecure and unsafe, and the Supreme Court of the State of California so held:

> "The jury viewed a freight car with a ladder of the construction shown in the instant case. Photographs of ladders of this type, and of other ladders appear in the record. We are of the view that the jury was justified in its decision that this bar constituted a hazard which rendered the ladder insecure."

Scarlett v. Atchison, supra.

III.

NO PRESUMPTION OF APPROVAL BY THE INTERSTATE COMMERCE COMMISSION OF THIS TYPE OF LADDER WITH BRACE ROD OBSTRUCTION, ARISES BY REASON OF FAILURE OF THE COMMISSION TO ENACT REGULATIONS FORBIDDING THE SAME.

It is contended by petitioner, that it is entitled to a legal presumption that the Interstate Commerce Commission acquiesced in the use of the brace rod in question as a part of the side ladder. Neither the facts nor the law sustain such a contention. In the first place, it is fundamental that custom will not justify a violation of a statute of this type, to-wit, one enacted for purposes of safety, such as the Safety Appliance Act. "Custom will not justify a violation of the Safety Appliance Act." *U. S. v. Chicago, St. Paul & O. R. R.*, 43 Fed. (2d) 300. Furthermore the evidence shows petitioner is the only railroad using this type of novel brace rod, extending out into the air, between the wall of the car and the ladder stiles, all other railroads using a flat rod flush with the side wall of the car. Justice will not countenance the establishment of a custom by the petitioner alone, thereby resulting in an escape from liability of the very mischief intended to be prevented by the Statute, particularly in the face of the testimony of petitioner's engineer that there are many ways of achieving the same bracing effect, without using this particular type of brace rod. (R. 48.)

This Court said in *Great Western R. R. v. Donaldson*, 246 U. S. 121; 62 L. ed. 616,

"nor can we agree with the contention of the plaintiff in error, that so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. *We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of §2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal Boiler inspector.*"

IV.

THE LADDER REGULATIONS OF THE COMMISSION DID NOT COVER THE UNSAFE FEATURES OF THIS LADDER, AND, EVEN IF APPLICABLE, WERE VIOLATED BY THE PETITIONER.

Petitioner contends that the only question involved in this case is one of clearance, specified by the regulations to be "minimum clearance of treads 2, preferably 2½ inches." Petitioner says the inner surface of the treads was 2½ inches from the outer surface of the rod, and therefore that ends the matter. The regulations of the Commission established under its order of March 13, 1911, page 5, with reference to ladders, contain no provisions with respect to obstructions of any kind in and about or within the ladder. The regulations are also silent as to clearance of the ladder with respect to the *stiles or uprights* of the ladder. The regulations are also silent with respect to any

clearance as between the side wall of the car and the verticle plane between the treads.

In other words, a tread itself, under the regulations, might have a clearance of 2½ inches, and yet there might be protrusions from the side wall of the car, extending outward and reaching the verticle plane between the treads, concerning which subject matter, no regulation of the Commission exists.

It is important to remember that the evidence here shows that respondent was injured, *not* while placing his foot on one of the treads, but when his foot came in contact with the brace rod obstruction *between* treads.

In addition, an examination of plaintiff's Exhibit No. 3 (R. 174) discloses that the uprights or stiles supporting the treads, were of substantial width and that the treads themselves were affixed to the *outer* edges of the *uprights* and extended somewhat outward from the outer surface of the uprights. Therefore, although the *inner* surface of the *treads* was 2½ inches from the *outer* surface of the diagonal brace *rod*, nevertheless the diagonal brace *rod* was almost flush with the *inner* surface of the *uprights*. So that there was practically no clearance at all between the outer surface of the diagonal brace *rod* and the inner surface of the *uprights*. There is no regulation of the Commission respecting the clearance of the uprights or stiles and we have here then, an obstruction between the uprights or stiles, and the side wall of the car,

governed by no clearance regulation of the Commission.

Assuming, however, for the sake of argument that the regulations of the Commission did apply with respect to the brace rod in question, then it could only be upon the theory that the brace rod was an additional tread, extending in a diagonal direction, and if this be the fact, then it would be clearly violative of the Commission's regulation with respect to clearance.

It is therefore clear that assuming that this brace rod was an obstruction in and about the ladder, there was no regulation of the Interstate Commerce Commission covering such obstruction. Petitioner, however, is insistent upon the argument that this particular brace rod is governed by the rules of the Interstate Commerce Commission. The only possible theory upon which these rules can be held to cover this type of construction, is that in effect and in the use of this ladder, the brace rod, constructed in practically the same plane as the ladder, was an additional tread, having the wrong clearance, the wrong angle, and the wrong space between itself and the other treads, in violation of all the rules adopted by the Commission. Petitioner is therefore faced with this dilemma. Either this ladder was unsafe in a respect *not* covered by any rule or regulation of the Commission, or it was unsafe and violated many of the rules and regulations of the Commission relating to ladders. In either phase, petitioner cannot escape liability for a trap such as it here main-

tained for its unwary brakeman, in violation of Section 2 of the Act.

On this same subject we call the Court's attention to Plate C, attached to and made a part of the Commission's Regulations under its order of March 13, 1911, a copy of which plate is reproduced opposite this page. It appears from Plate C, that the side ladder of a box car is required to be fastened to a clear and unobstructed verticle plane, with no obstruction between. One of two things must therefore be true. Either there is an admitted violation of Plate C, if it requires a clear unobstructed plane back of all the treads and uprights of the ladder, or if Plate C does not so require, then the Commission has not covered the whole field of safety required by the statute, in which event under the fundamental requirement of Section 2 of the Act, the question of fact remained as to whether or not the ladder was secure. (This fact the jury decided in favor of respondent.)

Considerable space is devoted by petitioner in its brief to the plea that the Safety Appliance Act should be construed in the light of practical railroad operations. In effect, petitioner says that anything its engineers determine to be practical, should be followed.

Certainly we agree that the Safety Appliance Act should be construed in the light of practical railroad operations. The record here shows, if we are to consider "practical railroad operations," that the other railroad companies in the United States have installed a type of flat brace rod which does not protrude from

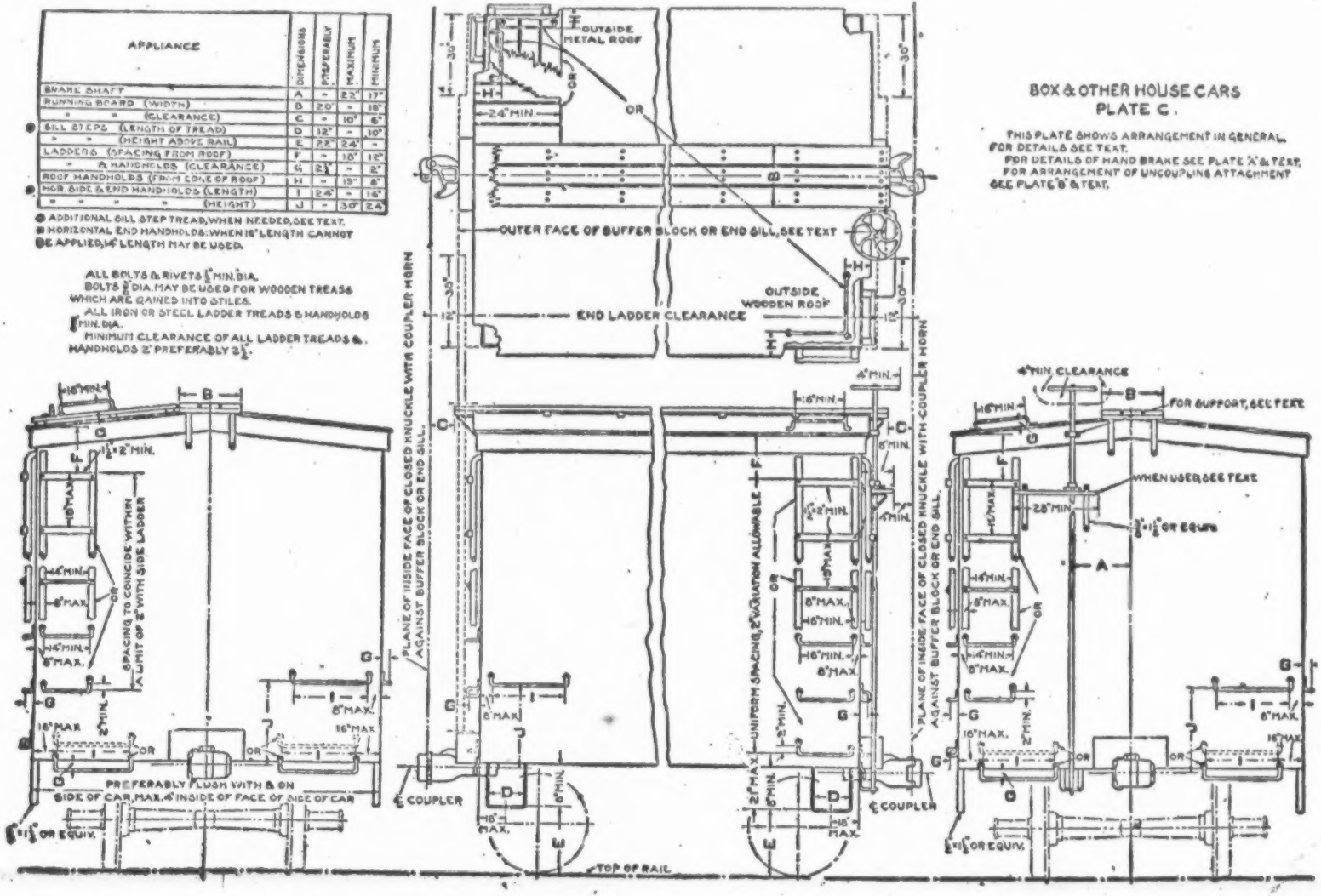
BOX & OTHER HOUSE CARS
PLATE C.

THIS PLATE SHOWS ARRANGEMENT IN GENERAL.
FOR DETAILS SEE TEXT.
FOR DETAILS OF HAND BRAKE SEE PLATE 'A' & TEXT.
FOR ARRANGEMENT OF UNCOUPLING ATTACHMENT SEE PLATE 'B' & TEXT.

APPLIANCE	DIMENSIONS	PREFERABLY	MAXIMUM	MINIMUM
BRAKE SHAFT	A	-	22"	17"
RUNNING BOARD (WIDTH)	B	20"	-	18"
" " (CLEARANCE)	C	-	10"	6"
● SILL STEPS (LENGTH OF TREAD)	D	12"	-	10"
" " (HEIGHT ABOVE RAIL)	E	22"	24"	-
LADDERS (SPACING FROM ROOF)	F	-	16"	12"
" & HANDHOLDS (CLEARANCE)	G	2½"	-	2"
ROOF HANDHOLDS (FROM EDGE OF ROOF)	H	-	19"	6"
● HOR. SIDE & END HANDHOLDS (LENGTH)	I	24"	-	16"
" " " " (HEIGHT)	J	-	30"	24"

● ADDITIONAL SILL STEP TREAD, WHEN NEEDED, SEE TEXT.
● HORIZONTAL END HANDHOLDS: WHEN 16" LENGTH CANNOT BE APPLIED, 14" LENGTH MAY BE USED.

ALL BOLTS & RIVETS ⅝" MIN. DIA.
BOLTS ½" DIA. MAY BE USED FOR WOODEN TREADS WHICH ARE GAINED INTO STILES.
ALL IRON OR STEEL LADDER TREADS & HANDHOLDS ⅝" MIN. DIA.
MINIMUM CLEARANCE OF ALL LADDER TREADS & HANDHOLDS 2" PREFERABLY 2½".



the side wall of the car and obviously does not interfere with the safe use of the ladder. It follows therefore that no practical requirement of railroad operations has estopped petitioner from doing likewise. Had it done so, it would not be here defending itself. Certainly the statement of an employee of petitioner, that he had never heard of any employee previously having suffered any injury, because of this type of construction, dilated upon as it has been by petitioner in its brief, should not have any persuasive effect upon this Court, in the light of "practical railroad operations." On this subject, the California Supreme Court said:

> "We see no room for complaint on the ground that this holding has not been rendered in the light of practical railroad operation. The record shows plainly that many types of bracing other than the round rod installed in the manner here shown, are used by various railroads."

We submit that the real basis of petitioner's "practical railroad operations" plea is their "off the record" argument and bewailment, as to the cost of properly re-equipping some of their box cars. On this subject the California Supreme Court had this to say:

> "Appellant's plea of the exigencies of the situation, in that re-equipment of its cars with a different type of bracing would work a great hardship upon it and necessitate the expenditure of a vast sum of money, of course relates to matters outside the record of this case. But even so, safety of employees, and not the financial problem, is the primary consideration. If a round diagonally-installed brace rod does constitute a dangerous trap

and hazard in use of the side ladder, it should be eliminated."

It is respectfully submitted that this case involves a violation of the Safety Appliance Act, correctly determined on the facts by the jury, and that the judgment of the Supreme Court of California, should be affirmed.

Dated, San Francisco,
February 15, 1937.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
Petitioner,

vs.

WILLIAM W. SCARLETT,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

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Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondent respectfully requests a rehearing herein upon the following grounds:

I.

That the ladder was not DEFECTIVE, as stated in the opinion, is not the test of compliance with, or violation of, the Safety Appliance Act. The Statute uses the word SECURE and *not* the word DEFECTIVE.

This Court, as well as other Federal and State Courts have all held that the word SECURE as used in the Statute means "safe and not exposed to danger".

In *Texas etc. v. Rigsby,* 241 U. S. 35, this Court stated that a *secure* ladder was one that would "enable the employees to safely ascend and descend".

In *Davis v. Raynolds,* 280 Fed. 362 (certiorari denied, 258 U. S. 627), *secure* steps were defined to mean "steps which furnished secure footing for employees having to use them".

In plain language, the object of the statute was to enable respondent, as well as all employees, to ascend and descend ladders in *security* and *safety.* If, in the use of ladders, employees' feet come in contact with an obstruction, then the ladder is *insecure;* that is, *not safe for use.* Whether or not either the ladder or the rod, as stated in the opinion, was *defective* is beside the question. No such issue was before this Court, or any of the lower Courts. By the use of the word DEFECTIVE, this Court by judicial legislation, has narrowed, restricted and circumscribed the beneficial purposes of the Safety Appliance Act. It has narrowed the humane purpose of a statute enacted, not for the benefit of the carrier, but for the benefit of railroad employees. By this decision, we respectfully urge, the Court has transposed the liability and benefit created by the statute; it has transformed the shield of the employee into the sword of the master; it has gone contrary to what now amounts to an almost universal application of this statute and to its own previously expressed humanitarian views with respect thereto.

The conclusion of the Court that the brace rod was not part of the ladder was arrived at because, obviously, the Court was looking for *defects* in the ladder as an appliance rather than *security in use* of the same appliance. If the test of security in use is applied, then clearly anything that renders the ladder *insecure in use,* is part and parcel of the ladder. Whether or not, the ladder was *defective* was entirely immaterial.

The right of recovery, we respectfully urge, does not "rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective". On the contrary the right of recovery, as shown by the long line of decisions in this country broadly and justly interpreting the humane purposes of the Act, depends upon the security or safety of the ladder in use. Suppose spikes, extending outward to brace the side walls of the car, behind the treads and uprights of the ladder, still cleared the treads by the distance prescribed by the Commission, would this Court narrow and restrict the humane purpose of the Act to hold that as long as the spikes were not defective and the rungs of the ladder were not defective, no right of recovery existed under the Act, even though it appeared that in use, the ladder would present the utmost danger to carrier's employees? Whether or not the brace rod was a part of the ladder as such is beside the question. If by the presence of any dangerous contrivance, security of the ladder in use is menaced, or impaired in the slightest degree, the Safety Appliance Act will, and has been held by

many Courts to, provide the protection and safeguard for employees intended by Congress.

The injury of respondent did not result from his use of the brace rod. Respondent was injured while using the ladder. We most respectfully contend that the absolute liability imposed by the Safety Appliance Act was not intended by Congress to be an instrumentality for the making of nice distinctions in limitation of the rights of safety accorded carrier employees in the performance of their duties. Absolute liability, we urge, is not a shield to be erected by the carrier to prevent the accrual of the clearly intended benefits of the Act. On the other hand, where a device appears to be insecure in use, the remedy should be afforded.

II.

Unless the Court intended by its opinion to overrule the case of *Great Western v. Donaldson,* 246 U. S. 121, the statement in the opinion of the existence of a presumption that the Interstate Commerce Commission knowingly permitted its rule with respect to ladder tread clearance, to remain unchanged, in spite of knowledge of the existence of the dangerous brace rod, *is* contrary to the case of *Great Western v. Donaldson,* supra.

This Court expressly held in the *Great Western v. Donaldson* case, that failure of the Interstate Commerce Commission to disapprove certain types of equipment, does not warrant the conclusion that the carrier thereby can escape liability.

Furthermore, the statement in the opinion that the diagonal brace rod was adopted in *1924* and that the proof shows that "for many years cars so equipped have been in general and constant operation on its lines" is not in accord with the record. The brace rods adopted in 1924 were in the *interior* of the cars. (R. 50.) The rods of the type in question admittedly were not put in use until *1929*. (R. 36.) The accident occurred August 27, 1931. (R. 20.) Two years use of the rod can therefore hardly be considered "many years" or "long continued use" as stated in the opinion.

There having been *in fact no* long continued use of this brace rod, there appears to be no legal justification for the conclusion of the Court. It follows therefore that this ladder was *insecure* in a respect not covered by *any* regulation of the Commission. This is the *pith* of the issue and yet, being the important Federal question involved, is *untouched* by the Court.

III.

The record fails to sustain the factual conclusion arrived at in the opinion, to the effect that the presence of the diagonal brace rod was not dangerous to life and limb of carrier's employees, for the reason given by the Court that no accident had been attributable thereto.

True, as stated in the opinion, the general foreman of the company testified that he had never heard of an accident attributable to the brace rod, except that

in the present case. Is it possible that the highest Court of the land bases its conclusion upon a statement of a railroad employee that *he* had never heard of another accident attributable to the brace rod? The opinion proceeds: "the record shows nothing to the contrary". If by this conclusion the Court means that no testimony was offered by respondent to show that in fact the general foreman *had heard* of such accidents, obviously respondent did not, and could not, have produced any such evidence. If the Court means by this conclusion that there was nothing in the record to show that there had been other accidents, with respect to the brace rod; then it must be that the Court has entirely overlooked the testimony of John F. Struby (R. 124), Clarence Craig (R. 125) and Theodore Shafer (R. 126), all employees or former employees of the carrier, who testified as to their feet hitting the brace rod.

We respectfully pray that this petition for a rehearing be granted, and this cause redetermined by this Court.

Dated, San Francisco, California,
April 14, 1937.

LOUIS E. GOODMAN,
Attorney for Respondent and Petitioner.

LOUIS H. BROWNSTONE,
CLIFTON HILDEBRAND,
JAMES F. HOEY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 505.—October Term, 1936.

The Atchison, Topeka and Santa Fe Railway Company, Petitioner, *vs.* William W. Scarlett. | On Writ of Certiorari to the Supreme Court of the State of California.

[March 29, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action under the Federal Safety Appliance Act (Act of April 14, 1910, c. 160, §§ 2 and 3, (36 Stat. 298*), brought by Scarlett against the railway company to recover damages for a personal injury resulting from an alleged violation of the act. It also was generally alleged that the injury was due to the negligence of the railway company. Scarlett was employed as a brakeman. While descending from a box car by means of a ladder attached to the side of the car, his foot slipped on a round brace rod, also attached to the side of the car immediately behind the ladder, and he fell to the ground, thereby sustaining the injury for which damages were sought.

The ladder itself was not defective. In its structure it complied with the regulations of the Interstate Commerce Commission made in pursuance of the act. "United States Safety-appliance Standards"—order of March 13, 1911. It is unnecessary to set forth these regulations. The only one important here prescribes—"Minimum clearance of treads, [shall be] two (2), preferably two-and-one-half (2½), inches." The round brace rods with which the car

*Section 2, so far as pertinent, provides that " . . . all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: . . ."

Section 3 requires the Interstate Commerce Commission, within a time fixed, to designate the number, dimensions, location and manner of application of the appliances provided for in the foregoing section. And these designations were to "remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission . . ."

was equipped extended outward from the wall of the car a distance of more than an inch. These brace rods operated to strengthen the walls of the car. That was their only purpose; and there is no doubt as to their necessity for that purpose. The brace rod in question ran down the side of the car at an angle of about 45°. The ladder overlay the brace rod, and cleared its outermost surface by more than the prescribed 2½ inches.

Scarlett's contention is that the brace rod is a part of the ladder, and by reason of its slant and rounded shape made the descent of the ladder insecure. At the trial, he abandoned his claim based upon negligence, and put his case wholly on the ground that the round diagonal brace rod and the ladder combined to constitute an unsafe appliance within the meaning of the act, and that, in consequence, the liability of the railway company was absolute. The case was submitted to the jury by the trial court upon that theory, and a verdict and judgment against the company resulted. That judgment the court below affirmed on appeal. — Cal. —.

The record shows that brace rods, generally flat in shape, are in practically universal use on box cars. The company here formerly used a flat rod; but finding that such a rod frequently buckled, sometimes immediately under the ladder, it was abandoned and the stronger and less elastic round type was adopted in its place. This was in 1924; and the proof shows that for many years cars so equipped have been in general and constant operation on its lines. The general foreman of the company, having charge of all the car repairs at one of the principal shops, and who inspected a thousand cars each month, testified that he had never heard of an accident attributable or claimed to be attributable to the round brace rod, except in the present case. The record shows nothing to the contrary.

In the light of the long-continued use of brace rods of the type here in question in the same relation to the ladder as is the case here, we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare *Pennell* v. *Phila. & Reading Ry.*, 231 U. S. 675, 680. The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute.

And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be substituted for that of the commission. See *Kansas City So. Ry.* v. *United States*, 231 U. S. 423, 456-457; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611-612; *Mahutga* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 182 Minn. 362, 366; *Auschwitz* v. *Wabash Ry. Co.*, 346 Ill. 190, 204; *Ford* v. *New York, N. H. & H. R. Co.*, 54 F. (2d) 342, 343.

In *Illinois Central R. R. Co.* v. *Williams*, 242 U. S. 462, 466, we held that § 2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under § 3. In the interim, we said, § 2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances "secure"; but that § 3 contemplated that these appliances "shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . ."

We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery, if any, must, therefore, rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk. *Ford* v. *New York, N. H. & H. R. Co., supra; Chicago, R. I. & P. Ry. Co.* v. *Benson*, 352 Ill. 195, 199; *Slater* v. *Chicago, St. P. M. & O. Ry. Co.*, 146 Minn. 390, 392-393. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.